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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

February, 1914, to June, 1914.

H. A. LIBBY
REPORTER

VOLUME 27

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FOR THE STATE OF NORTH DAKOTA.

OCT 14 1914

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THESE REPORTS.**

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HON. CHARLES J. FISK, Judge.

HON. EDWARD T. BURKE, Judge.

HON. EVAN B. GOSS, Judge.

HON. ANDREW A. BRUCE, Judge.

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CONSTITUTION OF NORTH DAKOTA.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

COUNTY COURTS.

In general, the county courts (so designated by the Constitution) are the same as the probate courts of other states.

CONSTITUTIONAL PROVISIONS.

SEC. 110. There shall be established in each county a county court, which shall be a court of record open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be two years.

SEC. 111. The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law; provided, that whenever the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased above that limited by this Constitution, then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court, the jurisdiction in cases of misdemeanors arising under state laws which may have been conferred upon police magistrates shall cease. The qualifications of the judge of the county court in counties where the jurisdiction of said court shall have been increased shall be the same as those of the district judge, except that he shall be a resident of the county at the time of his election, and said county judge shall receive such salary for his services as may be provided by law. In case the voters of any county decide to increase the

jurisdiction of said county courts, then such jurisdiction as thus increased shall remain until otherwise provided by law.

STATUTORY PROVISIONS.

Increased Jurisdiction: Procedure. The rules of practice obtaining in county courts having increased jurisdiction are substantially the same as in the district courts of the state.

Appeals. Appeals from the decisions and judgments of such county courts may be taken direct to the supreme court.

The following named counties now have increased jurisdiction: Benson; Bowman; Cass; Dickey; La Moure; Ransom; Renville; Stutsman; Ward; Wells.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

WILSON O. McCURDY v. LAURA M. BORING and Joseph M. Williams.

(146 N. W. 730.)

Services rendered — by person not near relation — agreement to pay — presumption of — compensation.

1. In an action where a person not a near relative, or otherwise under a family or social obligation, renders valuable services at the instance and request of another, the presumption will arise of an agreement to pay the reasonable value of such services. Where, therefore, one leaves with another his horses, and instructs such other to sell them as best he can, a presumption will arise that the latter was intended to be compensated for such services.

Authority to sell property — agency — selling with own property — notes in payment — division on accounting — cannot dictate — equity — court of.

2. Where a person is authorized to sell the horses of another, and to take bankable notes therefor, and sells such horses in conjunction with his own, taking notes therefor covering sales which include the horses of both persons, he will not be allowed to dictate as to the division of the notes on an accounting, but a court of equity will divide them as appears to it proper and just.

Deed — mortgage — action to have declared — answer — amount due — attorneys' fees — foreclosure.

3. In an action to have a deed declared a mortgage and for an accounting, 27 N. D.—1.

and in which the answer admits that the deed is a mortgage and merely asks that the court determine the amount due thereon and on such accounting, no attorneys' fees for the foreclosure of such mortgage will be allowed, as such answer does not constitute "an action or proceeding" for the foreclosure of a mortgage, as the term is used in § 7176, Rev. Codes 1905.

Evidence — findings — modified.

4. Evidence reviewed, and findings of the trial court as to items of accounting modified.

Opinion filed February 3, 1914.

Appeal from the District Court of Stutsman County, *Burke, J.*

Action to quiet title, to have a deed declared a mortgage, and for an accounting. Findings and judgment for plaintiff and respondent.

Modified.

Statement by BRUCE, J. This is an action to have a deed of real estate declared a mortgage, and for an accounting in relation to a number of transactions during which, and to secure which, the deed was given. The answer admits the claim as to the deed being a mortgage, and even goes so far as to ask for a foreclosure of the same and for the allowance of attorneys' fees. The controversy, therefore, is entirely over the matter of the accounting and the balance due the defendant or mortgagee thereon. The district judge found and adjudged that the plaintiff, Wilson O. McCurdy, had a fee title to, and was entitled to the possession of, the real estate in controversy; that the defendant Laura M. Boring had no right, title, interest, or lien or encumbrance in or to the same; and that the defendant Joseph M. Williams had no right, title, or interest in, or lien or encumbrance upon, said real estate, except a lien thereon for the payment of and to the extent of \$723.18. He also ordered and adjudged that the defendant Joseph M. Williams was entitled to the possession of certain notes for \$370, \$403, \$225, and \$300, respectively, which were received in a series of transactions between the litigants and executed by outsiders. He further ordered, adjudged, and decreed that the plaintiff, Wilson O. McCurdy, was entitled to the possession of certain notes in the amount of \$100, \$100, \$140, \$52, \$52, as well as of a certain horse. He further ordered and decreed a sale of the real estate to satisfy the mortgage or lien of

\$723.18, but refused to allow any attorneys' fees, and ordered that no costs should be taxed except to the extent of \$30, the fees allowed to the referee in the action, which were to be borne equally by the plaintiff, Wilson O. McCurdy, and the defendant Joseph M. Williams. The appeal is prosecuted by the defendant Joseph M. Williams alone, and a trial *de novo* is asked by him.

Knauf & Knauf, for appellant.

Appellant insist that in law and in all good conscience and equity the appellant is entitled to recover costs, disbursements, and attorneys' fees. Rev. Codes 1905, §§ 7176-7178; *Brown v. Skotland*, 12 N. D. 445, 97 N. W. 543.

R. G. McFarland, for respondent.

In an accounting the court will make application of the property in such a manner as is most in accord with justice and equity, and as will best protect the rights of both debtor and creditor. 30 Cyc. 1241, and cases cited.

This is not an action or proceeding having for its object the foreclosure of a mortgage, and hence the statutory attorneys' fees provided in such cases cannot be allowed. Rev. Codes 1905, §§ 7176, 7179; *Brown v. Skotland*, 12 N. D. 445, 97 N. W. 543; *Knapp v. Edwards*, 57 Wis. 191, 15 N. W. 140; 1 Enc. Pl. & Pr. 102, note 6; 1 Cyc. 449, div. g; 11 Cyc. 151, div. (11).

It is the rule that the findings of the trial court will not be disturbed when they have substantial support in the evidence, even though the evidence be conflicting. *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792; *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257, 100 N. W. 717; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306; *James River Nat. Bank v. Weber*, 19 N. D. 703, 124 N. W. 952.

BRUCE, J. (after stating the facts as above). It is conceded that on August 3, 1907, the plaintiff, McCurdy, executed and delivered to the defendant Williams a promissory note for \$540, secured by a mortgage on the real estate in controversy, and due November 20, 1908, with interest at 8 per cent per annum until due, and without any provision for interest after due. It is also established by the evidence, if not con-

ceded by respondent, that on September 10, 1908, the plaintiff mortgaged the real estate to Laura Boring to secure his indebtedness on the \$540 note to the defendant Williams and on a \$200 note to one John Knauf; and that on December 20, 1909, the said Laura Boring deeded the land in question to the defendant Williams; and that the said Williams agreed that his interest therein should be that of a mortgagee of the said plaintiff, McCurdy, for the purpose of securing the payment to him of the \$540 note with interest, before mentioned, and the claim of the said John Knauf, which then amounted to \$280.67, and which the defendant and appellant paid. The controversy ranges entirely over the question whether such mortgage was also intended to cover other debts which arose subsequently to the ones in question, and after the first conveyance to Laura Boring on August 1, 1907; and whether such debts were owing at all; also whether, at the time of the conveyance to Williams, the said Williams paid to the said Laura Boring the sum of \$380 at the instance and request of the said plaintiff, McCurdy; and whether said mortgage was intended to secure the same; the disputed items being \$650 with interest at 10 per cent from July 1, 1908; \$380 with interest at 7 per cent from December 20, 1909; \$72 with interest at 7 per cent from April 1, 1910; \$51.20 with interest at 7 per cent from April 3, 1910; \$44.50 with interest at 7 per cent from April 30, 1909; \$48 with interest at 7 per cent from December 20, 1909; \$35 with interest at 7 per cent from March 30, 1909.

In regard to the \$380 item, which it is alleged the defendant Williams paid to Laura Boring at the request of the plaintiff, on December 20, 1909, there is an irreconcilable conflict in the testimony. Laura Boring and the defendant Williams swear one way, and the plaintiff, McCurdy, swears the other. Laura Boring was a confidential clerk of the defendant Williams. The trial judge had the opportunity of seeing these witnesses face to face, and of studying their demeanor upon the witness stand. This opportunity we have not had. Our conclusions in the matter would be a mere guess, and we therefore affirm the holding of the trial court, who chose to credit the plaintiff, and to hold that the money was not paid at all, or if paid was not paid with the consent of the plaintiff so as to be binding upon him.

The same is true of the \$650 note. The defendant Williams claims that it was given for money advanced and horses sold. The plaintiff,

McCurdy, on the other hand, claims that it was without any consideration, and was given to cover up the 1908 crop, so that it could not be taken by his other creditors, and was given although the crop was already covered by a chattel mortgage securing a note for \$352, dated March 8, 1907, which later was taken up and superseded by the real estate mortgage for \$540, dated August 3, 1907, and before referred to. Defendant's counsel seeks to prove that this statement is false, by showing that the chattel mortgage of March 8, 1907, securing the note of \$352, covered not merely the crop, but horses and stock. We see nothing, however, in this point, as, even if the note was afterwards taken up by the note for \$540, before mentioned, the temptation to secure the crop from creditors would still remain. The reason given for the new mortgage was that when the first one was given, the crop had not been planted and had no potential existence. The mortgage and note, in short, in our opinion, were fraudulent, and both parties participated in the fraud. If the plaintiff was seeking to rely thereon, we, perhaps, would give him no relief, as his hands might not be clean. It is the defendant, however, who is seeking to prove this mortgage in his accounting, so there is no reason why the plaintiff should be charged therewith even though the transaction was fraudulent.

We are, on the other hand, however, fully satisfied that the defendant is entitled to the commission of \$51.20 with interest at 7 per cent from April 1, 1910, and \$44.50 with interest at 7 per cent from April 1, 1909; also to the \$72 with interest at 7 per cent from April 1, 1910, claimed for wintering the stock. The rule is elementary that if a person not a near relative, etc., renders valuable services at the instance and request of another, a presumption will arise of an agreement to pay the reasonable value of such services. It would serve no useful purpose to recite the evidence at length here, and it is sufficient for us to say that we are quite satisfied that, though the defendant Williams had chattel mortgages upon the horses of plaintiff and a mortgage upon his real estate, a running account was had between them, and both parties were interested in covering up the property so that they might be secure from the attacks of other creditors. The chattel mortgages, therefore, were never foreclosed, nor was there ever at any time any intention or effort to sell the horses thereunder, nor to sell at sheriff's sale or for cash to the highest bidder. Plaintiff merely left his horses with the

defendant, protected as they were by the chattel mortgages from the attacks of other creditors, and told the defendant to sell them as best he could, and authorized him to take bankable paper in his own name (and this to escape garnishment), but subject to an accounting between them. If plaintiff should be allowed the privilege of an accounting against the defendant at all in a case of this kind, where the transaction seems hardly to bear the earmarks of honesty as regards other creditors, he should certainly be charged with the commissions in question.

As far as the \$72 item for the feed and care of the horses is concerned, the same considerations apply. As we read even plaintiff's own evidence, the horses were left with the defendant to be sold, and an agreement to pay the reasonable cost of their keep would be implied.

As far as the alleged loans of \$48 and \$35 respectively by the defendant to the plaintiff are concerned, there is a conflict of evidence. The evidence of the defendant, however, seems to be corroborated by other witnesses, and we cannot help believing that the weight of this evidence was upon his side. We therefore allow him these items.

On the other hand, we find in the proof and the pleadings no foundation for the allowance of \$100 to the defendant Williams for expenses and compensation. We hold, indeed, that the allowance of the commissions and the \$72 for the keeping of the horses is all that the proof and the pleadings sustain.

We find no fault with the disposition made by the trial court of the various notes. Defendant chose to mingle the transactions with his own, and to take notes covering mixed transactions in which he himself was interested. He can hardly dictate as to the division. We are quite satisfied that the application made by the trial court was both proper and just.

We are of the opinion that the trial court was justified in refusing the allowance of attorneys' fees in this case. It is not a case in which § 7176, Rev. Codes 1905, applies. The defendant Williams at no time commenced "an action or proceeding" for the foreclosure of his mortgage. The plaintiff asked to have the deed declared a mortgage, and at the same time for an accounting. The answer admitted the fact that the deed was a mortgage, but at no time asked for its foreclosure. All that he demanded judgment for was that "said deed be declared a

mortgage, securing said debts, and that (2) the court determine the amount due this defendant from said plaintiff in accordance with the foregoing answer and as set forth therein, and declaring the same to be due thereunder; (3) for attorneys' fees in the sum of \$150, and for his costs and disbursements, and for such other and further relief as may seem meet and just."

We are satisfied, indeed, that the trial court erred in peremptorily decreeing a sale of the premises for the amount found by him to be due. The deed or mortgage was given to secure a running account, which was in dispute between the parties. An accounting seemed to be necessary, and no sale of the property or foreclosure of the mortgage could or should have been decreed until (1) the deed had been found to be a mortgage; (2) the amount owing had been ascertained; (3) an opportunity to pay the amount had been afforded.

The judgment of the district court is in all things sustained, save and except that the said land is decreed to be subject to a lien of \$818 with interest thereon at 7 per cent from the 30th day of November, 1910, instead of \$723.18, as found by the trial court. In place, also, of a foreclosure of the said mortgage being decreed, the said amount of \$818 is hereby decreed to be a lien upon said land, which, if not paid within 30 days from the handing down of the remittitur herein, may be enforced by a sale of the property under special execution. The costs of this appeal will be borne by plaintiff and respondent.

BURKE, J., being disqualified, did not participate.

On Petition for Rehearing.

BRUCE, J. On the rehearing in this case, we have carefully reviewed the evidence in regard to the \$380 and the \$650 items. We now are of the opinion that the contention of the appellant in regard to these transactions should be sustained. We find, indeed, that the testimony of the defendant Williams is quite strongly corroborated by that of Laura Boring, Henry Boring, and Fulton I. Kaufman. This testimony we cannot ignore in examining the record as we now do, and are compelled by the statute to do on a trial *de novo*, and without the chance or opportunity of watching the demeanor of the witnesses upon the stand,

and of forming an estimate as to their honesty except as it appears upon the printed record.

Our faith, too, in the judgment of the trial court in the present case, is much shaken by the disclosure of the record that he was called away at the beginning of the taking of the testimony, and only heard that which was most disadvantageous to the appellant, the testimony as a whole being merely read to him by the stenographer.

We now therefore credit the appellant with the two items of \$380 and \$650 and the interest thereon, and decree the land to be subject to a lien of \$2,010.22, with interest thereon at 7 per cent per annum from the 30th day of November, 1910, instead of \$818, as heretofore decreed by us, and of \$723.18, as decreed by the trial court. If this sum is not paid within thirty days from the handing down of the remittitur herein, a sale of the property may be enforced under special execution. The costs of this appeal will be borne by plaintiff and respondent.

THE RED RIVER VALLEY BRICK COMPANY, a Domestic Corporation, School District No. 59, and The Township of Falconer, of the County of Grand Forks, North Dakota, v. THE CITY OF GRAND FORKS, a Public Corporation, M. F. Murphy, as Mayor, Sim Miller, as Assessor, and C. J. Evanson, as Auditor, of the City of Grand Forks.

(145 N. W. 725.)

City — annexing adjacent territory — advisability — wisdom — political question.

1. The question of the advisability or wisdom of annexing adjacent territory to an incorporated city is a political question.

Note. — The authorities on the question of the power of the legislature to annex territory to municipalities are collated in a note in 27 L.R.A. 737.

On the question of discrimination between residents or property owners in territory annexed, as to right to defend against annexation of territory to municipality, see note in 17 L.R.A.(N.S.) 421. And as to who may raise objection that statute annexing land to cities contains unconstitutional discrimination, see note in 32 L.R.A.(N.S.) 957.

Authorities of city — requirements of the law — judicial questions.

2. Whether the authorities of an incorporated city have complied with the law authorizing the annexation of adjacent territory, the effect of irregularities or omissions in attempting to follow the method of annexation prescribed by statute, what are the corporate limits of a city, whether it is a corporation, whether the legislative authority has been exceeded in an attempt to extend the boundaries, and similar questions, are judicial questions.

Proceeding — quo warranto — remedy — city — annexation of territory — individuals — special interests.

3. A proceeding in the nature of quo warranto, under § 7351, Rev. Codes 1905, was not intended to provide the remedy for an unlawful or irregular annexation of adjacent territory to an incorporated city, when such proceeding is instituted by individuals or those having special interest in the subject.

Certiorari — annexation — regularity — record of proceedings — outside facts.

4. Certiorari is not the proper proceeding by which to test the regularity and the legality of an attempted annexation of adjacent territory to an incorporated city, at least not when, among the facts alleged as rendering the proceedings invalid, are facts outside the record made in the proceedings of the city authorities.

Injunction — remedy — invalid annexation.

5. Injunction is the appropriate remedy to prevent carrying into effect an invalid attempt at annexation of territory adjacent to an incorporated city, when sought by a party having a special interest therein.

School district — township — interest — maintain action.

6. A school district and a township have sufficient interest in a change of a part of the territory included therein from the school district into the adjacent city district, and from the township into the adjacent city, by means of which the taxable real estate in such township and district would be greatly lessened and the rate of taxation materially increased, to qualify them to maintain an action to test the validity of the annexation proceedings.

Proceedings to test validity of annexation — delay — laches.

7. Under the facts of this case, a delay of less than five months in instituting proceedings to test the validity of an attempted annexation of adjacent territory by the city of Grand Forks does not constitute such laches as will defeat the action.

City — may extend boundaries — resolution — amended resolution — material change — invalid — rights of parties.

8. Sec. 2825, Rev. Codes 1905, as amended by chap. 58, Laws of 1909, permits any city to extend its boundaries so as to increase its territory, not to exceed one half its present area, by resolution of the city council passed by two thirds of the entire members elect.

Sec. 2826, as amended by the same act, requires such resolution to be published in the manner therein set forth, and copies posted within the territory proposed to be annexed, and provides that the territory described in such resolution shall be included within, and become a part of the city, unless a written protest signed by a majority of the property owners in the proposed extension is filed as therein provided, and that, if such protest is filed, the council shall hear testimony, make a personal inspection of the territory, when, if in its opinion such territory ought to be annexed, and if, by resolution passed by two thirds of the entire members elect, it shall order such territory to be included within the city, it shall make and cause an order to be made and entered, describing the territory annexed, whereupon the territory described in such resolution shall be included in, and become a part of, the city.

The city council of the city of Grand Forks passed a resolution describing and annexing certain territory to the city. After notice duly given, property owners filed protests against the annexation, whereupon the original resolution was amended so as to include materially less territory than described in the original resolution, and the territory described in the amended resolution was thereupon declared annexed to the city, without the publication or posting of any notice of the amendment or of the proposed annexation of the lesser territory.

It is held that the annexation was rendered invalid by this procedure, for the reason that the parties interested had no notice of any contemplated annexation of the territory finally attempted to be annexed, and had no opportunity to protect themselves and their rights as against such annexation. The change from one municipality to another, the increase in the rate of taxation, the added burdens incident to becoming a part of a city, are material to the rights of the parties affected.

City — annexation of adjacent territory — extraordinary power — statute — compliance with.

9. The statute referred to, and providing for the annexation of adjacent territory to an incorporated city, must be strictly construed under the doctrine of *Stern v. Fargo*, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403, and because, if valid, it grants cities most extraordinary power by permitting them to annex territory in direct opposition to the wishes and protests of all the people whose interests are to be affected, and because this power is only granted upon a condition precedent, that the statute shall be complied with.

Opinion filed February 5, 1914.

Action by above-named respondents to enjoin the city of Grand Forks and its officers from levying and collecting taxes and exercising jurisdiction over certain territory attempted to be annexed to said

city. From a judgment of the District Court of Grand Forks County in favor of plaintiffs the defendants appeal, *Hon. C. F. Templeton, J.*
Affirmed.

Statement by BRUCE, J. The Red River Valley Brick Company, a domestic corporation, School District No. 59, and the township of Falconer, of the county of Grand Forks, brought this action against the city of Grand Forks, its mayor, and auditor. The complaint occupies about thirty pages and need not be set forth at length. We shall refer to the facts found by the trial court, which are not seriously in dispute; in fact, on most of them the parties agree.

The prayer for relief is, "First, that the defendant, the city of Grand Forks, the officers named, and all other officers, agents, and employees, be perpetually restrained and enjoined from asserting, exercising, enjoying, maintaining, or practising any authority, jurisdiction, or power of any nature whatever, upon or over any of the territory described in the resolutions herein set forth, and from claiming and asserting the same to be included within and a part of the said city; second, that the defendant, Sim Miller, particularly, be perpetually enjoined and restrained from assessing, or pretending to assess, or listing for assessment or taxation by the city or Park District or Independent School District No. 1 of Grand Forks, any of the lands described or embraced in said resolutions; third, that the said resolutions and all proceedings had thereunder be adjudged and decreed to be null and void and of no effect; fourth, for such other and further relief as to the court shall seem just and equitable; fifth, for their costs and disbursements herein."

Defendants first appeared specially and objected to the jurisdiction of the court on grounds which need not here be mentioned, and later served an answer. A trial was had and findings of fact made by the trial court covering the material facts sufficient for an understanding of the assignments and to lay the foundation for our decision.

It was founded that the township of Falconer was a public corporation of the state, embracing certain described territory, with an aggregate assessed valuation of real and personal property of \$183,517; that School District No. 59 was a public corporation organized and existing for school purposes under the laws of the state, and embraced certain described territory, having an aggregate assessed valuation,

real and personal, of \$181,200, and possessed school and other property of the value of several thousand dollars, with no indebtedness; that the city of Grand Forks was a public corporation of the state, duly organized and existing under the provisions of the Political Code, embracing certain territory having an area of 1,572.90 acres, with a total assessed valuation of \$4,159,215, an outstanding and unpaid indebtedness of \$418,209, and outstanding, unpaid special improvement warrants aggregating \$942,178; that the persons named were the mayor, assessor, and auditor of the city; that the Red River Valley Brick Corporation was a domestic corporation, and the owner and in possession of certain real property described, which at all times concerned had been used for, and devoted by it to, the purposes of a brickyard, and the manufacture of brick therein; and that such tract was a part of School District No. 59 and of the township of Falconer, and had never been included in the city of Grand Forks; that a large amount of machinery and property was located therein and used in the manufacture of brick; that such property had been taxed by School District 59, in the township of Falconer, and never by the city of Grand Forks; that there were no dwellings or business houses therein save a small building used a part of each year in which to shelter and board employees; that said plant was used only about four months in each year, and during the remainder of the time stood idle and vacant. Then facts were found showing that about 10 per cent of such tract was deeply excavated in obtaining clay, and that 50 or 60 acres thereof were devoted to farming and pasturage; that at the regular meeting of the city council of Grand Forks, on April 9, 1911, there was introduced a resolution to incorporate certain territory within the city of Grand Forks, and containing 816.52 acres, of which 771.74 acres were then, and prior thereto had been, outside the limits of said city; that the land described in said resolution consisted of at least two separate tracts, belonging to different owners; that such resolution was adopted by the city council; that thereafter the city auditor published such resolution in the official newspaper on certain named dates, including a description of the property to be annexed, with a notice fixing the 2d day of October, 1911, as the time when interested persons might appear and be heard for or against such extension of the city limits; that copies of such resolution and notices were posted as required by law, and thereafter a written

protest signed by a majority of the property owners of the proposed extension was filed with the city auditor, and a personal inspection of such territory was made by the city council; that the regular meeting of the council on October 2d was adjourned from October 2d, 1911 to October 23d, 1911, at which time an amendment to such resolution was proposed and adopted, excluding from the territory described in the original resolution and notice certain described tracts of land, and the description in the original resolution was amended to conform to the amendment so adopted, and the resolution so amended was adopted with a statement of the reasons therefor; that the territory described in the official resolution consisted of at least two separate isolated tracts, not connected with each other, and of many separate tracts belonging to different owners, and embraced the same territory as described in the original resolution, less that eliminated by the amendment, and, as finally adopted, included and embraced 700.89 acres not theretofore included within the limits of the city.

The court also found that the city of Grand Forks constituted the Park District of the city of Grand Forks, and also the Independent School District No. 1, each having powers independent and different from those of the city of Grand Forks; that each was indebted in enormous sums of money, represented by outstanding bonds and warrants; that the tax rate of the city of Grand Forks was 19.3 mills, of the School District 20 mills, of the Park District 2.9 mills, being a total of 42.2 mills; that the tax rate of School District 59 for the same year was 2.7 mills; that the assessed value of real and personal property included within the resolution last named, and taken from School District 59, was \$29,308, or 16 per cent of the total assessed value of property within such district; and that by reason thereof the revenue of said district would be diminished 16 per cent, and thereby an increase of the tax rate therein of 19 per cent would be necessary; that the assessed value of the real and personal property taken from Falconer township was \$18,439, or 10 per cent of the total assessed valuation of such township; that thereby the revenue of said township would be diminished 10 per cent, and its taxing rate increased 11 per cent; that the taxes upon the property of the Red River Valley Corporation, plaintiff, would be largely and materially increased thereby; that such increase would be from less than 6 mills on the dollar to more than 42

mills on the dollar of their property; and that it would become liable for its proportionate share of the outstanding unpaid indebtedness of the city, Park District, and School District of Grand Forks. The property of the brick company and portions of the territory of the school district and township named were included in the resolution of annexation.

The trial court found from these facts, that the attempted annexation of territory set forth was null and void and of no effect, and entered a decree perpetually enjoining the city and its officials from asserting, exercising, or maintaining any jurisdiction of any nature whatsoever upon or over such territory.

A number of findings of fact presented by the defendants were refused. They, however, need not be specifically mentioned, as they all relate to facts going toward the wisdom or propriety of making the annexation.

J. B. Wineman, for appellants.

The complaint and affidavits upon which the injunction issued are insufficient. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Oliver v. Omaha*, 3 Dill. 368, Fed. Cas. No. 10,499; *Burnett v. Sacramento*, 12 Cal. 84, 73 Am. Dec. 518; *Dixon v. Mayes*, 72 Cal. 166, 13 Pac. 471; *Linton v. Athens*, 53 Ga. 588; *Cary v. Pekin*, 88 Ill. 154, 30 Am. Rep. 543; *Stilz v. Indianapolis*, 55 Ind. 515; *Logansport v. Seybold*, 59 Ind. 225; *Perkins v. Burlington*, 77 Iowa, 553, 42 N. W. 441; *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031; 1 *Cooley*, Taxn. 3d ed. 245, 246.

Equity will not enjoin the collection of a municipal tax by injunction where the taxing power has been exercised within the limits of the law. *Groff v. Frederick City*, 44 Md. 67; *Manly v. Raleigh*, 57 N. C. (4 Jones, Eq.) 370; *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742; *High, Inj.* 4th ed. 521, 522; *Continental Hose Co. v. Mitchell*, 15 N. D. 145, 105 N. W. 1108; *Ogle v. Belleville*, 238 Ill. 389, 87 N. E. 354.

Such proceeding does not lie where the tax is not due, and where there is no threat to collect it. *Insurance Co. of N. A. v. Bonner*, 24 Colo. 220, 49 Pac. 366; *Troutman v. McClesky*, 7 Tex. Civ. App. 561, 27 S. W. 173, 22 Cyc. 775, 776; *Logansport v. Seybold*, 59 Ind.

225; *Glover v. Terre Haute*, 129 Ind. 593, 29 N. E. 412; *Kuhn v. Port Townsend*, 12 Wash. 605, 29 L.R.A. 445, 50 Am. St. Rep. 911, 41 Pac. 923; *Union P. R. Co. v. Cheyenne* (*Union P. R. Co. v. Ryan*) 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601.

Nothing that can be remedied by a suit at law will justify or authorize an injunction. *State R. Tax Cases*, 92 U. S. 575, 23 L. ed. 669; *Arkansas Bldg. & L. Asso. v. Madden*, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119; *Lyon v. Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; *Milwaukee v. Kœffler*, 116 U. S. 219, 29 L. ed. 612, 6 Sup. Ct. Rep. 372; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County*, 11 N. D. 107, 90 N. W. 260; *Schaffner v. Young*, 10 N. D. 245, 86 N. W. 733; *St. Anthony & D. Elevator Co. v. Bottineau County* (*St. Anthony & D. Elevator Co. v. Soucie*) 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; *Chicago & N. W. R. Co. v. Rolfson*, 23 S. D. 405, 122 N. W. 344.

The plaintiffs have pursued the wrong remedy. *Quo warranto* was their proper remedy. *State ex rel. Fletcher v. Osburn*, 24 Nev. 187, 51 Pac. 839; *State ex rel. Anderson v. Tillamook*, 62 Or. 332, 124 Pac. 638; *State ex rel. French v. Cook*, 39 Or. 377, 65 Pac. 89; *State v. Millis*, 61 Or. 245, 119 Pac. 763; *People ex rel. Warren v. York*, 247 Ill. 591, 93 N. E. 401; *Osburn v. People*, 103 Ill. 224; *Blake v. People*, 109 Ill. 504; *Keigwin v. Drainage Comrs.* 115 Ill. 347, 5 N. E. 575; *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246; *Bodman v. Lake Fork Special Drainage Dist.* 132 Ill. 439, 24 N. E. 630; *People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294; *People ex rel. Sibley v. Dyer*, 205 Ill. 575, 69 N. E. 70; *Shanley v. People*, 225 Ill. 579, 80 N. E. 277.

A private individual will not be permitted to attack the incorporation collaterally and contend that it is not valid. *Forsythe v. Hammond*, 142 Ind. 505, 30 L.R.A. 576, 40 N. E. 267, 41 N. E. 950; *Indianapolis v. McAvoy*, 86 Ind. 587; *Kuhn v. Port Townsend*, 12 Wash. 605, 29 L.R.A. 445, 50 Am. St. Rep. 911, 41 Pac. 923; *State ex rel. Lowe v. Henderson*, 145 Mo. 329, 46 S. W. 1076; *School Dist. v. State*, 29 Kan. 57; *State ex rel. Brown v. Pierre*, 15 S. D. 559, 90 N. W. 1047; *Coe v. Gregory*, 53 Mich. 19, 18 N. W. 541; *McCain v. Des Moines*, 128 Iowa, 331, 103 N. W. 979; *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558.

Laches may defeat *any* right to attack. *State v. Leatherman*, 38

Ark. 81; State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 819.

Injunction is not the remedy by which to test the legality of the organization of a municipality. 2 High, Inj. 4th ed. p. 1259; St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator Co. v. Soucie) 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; Schaffner v. Young, 10 N. D. 253, 86 N. W. 733; Topcka v. Dwyer, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239; 1 Dill. Mun. Corp. 5th ed. 617; Wilcox v. Tipton, 143 Ind. 241, 42 N. E. 614; Kuhn v. Port Townsend, 12 Wash. 605, 29 L.R.A. 445, 50 Am. St. Rep. 911, 41 Pac. 925; Frace v. Tacoma, 16 Wash. 69, 47 Pac. 220; People v. Ontario, 148 Cal. 625, 84 Pac. 207; Whittaker v. Venice, 150 Ill. 195, 37 N. E. 241; People ex rel. Cooney v. Peoria, 166 Ill. 517, 46 N. E. 1075; McCain v. Des Moines, 174 U. S. 177, 43 L. ed. 939, 19 Sup. Ct. Rep. 644; Glaspell v. Jamestown, 11 N. D. 88, 88 N. W. 1023; State ex rel. Walker v. McLean County, 11 N. D. 360, 92 N. W. 385; Ward v. Gradin, 15 N. D. 653, 109 N. W. 57; Ogle v. Belleville, 238 Ill. 389, 87 N. E. 354; Trumbo v. People, 75 Ill. 561; Nunda v. Chrystal Lake, 79 Ill. 311; Geneva v. Cole, 61 Ill. 397; People ex rel. Huck v. Newberry, 87 Ill. 41; Alderman v. School Directors, 91 Ill. 179; Osborn v. People, 103 Ill. 224; People ex rel. Goedtner v. Pederson, 220 Ill. 554, 77 N. E. 251.

An information in the nature of quo warranto is the proper proceeding to try the question of the legality of the annexation of territory to a municipal corporation. 2 Bailey, Habeas Corpus & Special Remedy, p. 1305; 32 Cyc. 1424; People ex rel. Adams v. Oakland, 92 Cal. 611, 28 Pac. 807; People ex rel. Cooney v. Peoria, 166 Ill. 517, 46 N. E. 1075; People v. Maynard, 15 Mich. 463; State ex rel. Childs v. Crow Wing County, 66 Minn. 519, 35 L.R.A. 745, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631; State ex rel. Crow v. Fleming, 147 Mo. 1, 44 S. W. 758; State ex rel. Brown v. Westport, 116 Mo. 582, 22 S. W. 888; State ex rel. Brown v. McMillan, 108 Mo. 153, 18 S. W. 784; East Dallas v. State, 73 Tex. 371, 11 S. W. 1030; State ex rel. Fullerton v. Des Moines City R. Co. 135 Iowa, 694, 109 N. W. 867; State ex rel. Harmis v. Alexander, 129 Iowa, 539, 105 N. W. 1021; State v. Independent School Dist. 29 Iowa, 264; People ex rel. Warren v. York, 247 Ill. 591, 93 N. E. 400; McCain v. Des Moines, 128 Iowa, 331,

103 N. W. 979; *People v. Ontario*, 148 Cal. 625, 84 Pac. 205; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; *Stuart v. School Dist.* 30 Mich. 69; *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558; *St. Louis v. Shields*, 62 Mo. 247; *State ex rel. Hoya v. Dunson*, 71 Tex. 65, 9 S. W. 103; *Harness v. State*, 76 Tex. 566, 13 S. W. 535; *Butler v. Walker*, 98 Ala. 358, 39 Am. St. Rep. 61, 13 So. 261; *State ex rel. Cole v. New Whatcom*, 3 Wash. 7, 10, 27 Pac. 1020; *State ex rel. Anderson v. Tillamook*, 62 Or. 332, 124 Pac. 641; *Velasquez v. Zimmerman*, 30 Colo. 355, 70 Pac. 420; *McDonald v. Rehner*, 22 Fla. 198; *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385; *Ward v. Gradin*, 15 N. D. 649, 109 N. W. 57.

The validity of the incorporation can be determined only in a suit for that purpose in the name of the state, or by some individual under the authority of the state, who has a special interest. *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239; *School Dist. v. Fremont County*, 15 Wyo. 73, 86 Pac. 24, 11 Ann. Cas. 1058; *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222; *Reclamation Dist. v. McPhee*, 13 Cal. App. 382, 109 Pac. 1106; *Metcalf v. Merritt*, 14 Cal. App. 244, 111 Pac. 505; *Constitution v. Chestnut Hill Cemetery Asso.* 136 Ga. 778, 71 S. E. 1037; *People ex rel. Wies v. Bowman*, 247 Ill. 276, 93 N. E. 244; *People ex rel. Vaughn v. Welch*, 252 Ill. 167, 96 N. E. 991; *School Dist. v. Jones*, 229 Mo. 510, 129 S. W. 705; *Stout v. St. Louis, I. M. & S. R. Co.* 142 Mo. App. 1, 125 S. W. 230; *School Dist. v. Young*, 152 Mo. App. 304, 133 S. W. 143; *O'Brien v. Schneider*, 88 Neb. 479, 129 N. W. 1002; *Prankard v. Cooley*, 147 App. Div. 145, 132 N. Y. Supp. 289; 147 App. Div. 935, 132 N. Y. Supp. 1143; *Ex parte Keeling*, 54 Tex. Crim. Rep. 118, 130 Am. St. Rep. 884, 121 S. W. 605; *Ex parte Koen*, 58 Tex. Crim. Rep. 279, 125 S. W. 401; *Coffman v. Goree Independent School Dist.* — Tex. Civ. App. —, 141 S. W. 132.

Neither are such proceedings subject to collateral attack. *Hatch v. Consumers' Co.* 17 Idaho, 204, 40 L.R.A.(N.S.) 263, 104 Pac. 670; *Ogle v. Belleville*, 238 Ill. 389, 87 N. E. 353, 143 Ill. App. 514; *People ex rel. Warren v. York*, 247 Ill. 591, 93 N. E. 400; *Johnson v. Indianapolis*, 174 Ind. 691, 93 N. E. 17; *Meffert v. Brown*, 132 Ky. 201, 116 S. W. 779, 1177; *Powell v. Scranton*, 39 Pa. Super. Ct. 488;

Missouri, K. & T. R. Co. v. Bratcher, 54 Tex. Civ. App. 10, 118 S. W. 1091; State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; Topeka v. Dwyer, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239; Albia v. O'Harra, 64 Iowa, 297, 20 N. W. 444; Powell v. Greensburg, 150 Ind. 148, 49 N. E. 955; Schriber v. Langlade, 66 Wis. 616, 29 N. W. 547, 554; Sage v. Plattsmouth, 48 Neb. 558, 67 N. W. 455; People v. Smith, 131 Mich. 70, 90 N. W. 666; People ex rel. Quisenberry v. Ellis, 253 Ill. 369, 97 N. E. 697, Ann. Cas. 1913A, 589; 1 Dill. Mun. Corp. 4th ed. art. 43a; Blackwell v. Newkirk, 31 Okla. 304, 121 Pac. 270, Ann. Cas. 1913E, 441; Clement v. Everest, 29 Mich. 22; Atchison, T. & S. F. R. Co. v. Wilson, 33 Kan. 223, 6 Pac. 281; Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514, 777; Reclamation Dist. v. Turner, 104 Cal. 335, 37 Pac. 1039; Metcalfe v. Merritt, 14 Cal. App. 244, 111 Pac. 506; People ex rel. Longress v. Board of Education, 101 Ill. 508, 40 Am. Rep. 196; State ex rel. Fletcher v. Osburn, 24 Nev. 187, 51 Pac. 839; State ex rel. Brown v. Wilson, 216 Mo. 215, 115 S. W. 567; School Directors v. School Directors, 135 Ill. 464, 28 N. E. 50; State ex rel. Childs v. Crow Wing County, 66 Minn. 519, 35 L.R.A. 745, 68 N. W. 767, 69 N. W. 926, 73 N. W. 631; People ex rel. Scrafford v. Gladwin County, 41 Mich. 647, 2 N. W. 904; Laws 1879, chap. 14, § 25; State v. Bradford, 32 Vt. 50; People ex rel. Kingsland v. Clark, 70 N. Y. 518; Chesshire v. People, 116 Ill. 493, 6 N. E. 486; Comp. Laws, 5348, Subdiv. 3; Territory ex rel. District Attorney v. Armstrong, 6 Dak. 226, 50 N. W. 832.

Even certiorari would be a proper remedy. State ex rel. Johnson v. Clark, 21 N. D. 517, 131 N. W. 715, 6 Cyc. 745.

The plaintiffs are guilty of laches. Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Johnson v. Indianapolis, 16 Ind. 227; Newman v. Sylvester, 42 Ind. 106; Madison v. Smith, 83 Ind. 502; Swift v. Williamsburgh, 24 Barb. 427; Black v. Brinkley, 54 Ark. 372, 15 S. W. 1030; Coler v. Dwight School Twp. 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587; State ex rel. Minot v. Willis, 18 N. D. 76, 118 N. W. 320; Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499.

The plaintiffs are estopped by their laches and acquiescence. 28 Cyc. 214, and cases cited; People v. Maynard, 15 Mich. 463; Jameson

v. People, 16 Ill. 257, 63 Am. Dec. 304; Speer v. Kearney County, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 762; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 388; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; State v. Leatherman, 38 Ark. 81; People ex rel. Atty. Gen. v. Alturus County, 6 Idaho, 418, 44 L.R.A. 122, 55 Pac. 1067; School Dist. v. State, 29 Kan. 62; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312; State ex rel. Minot v. Willis, 18 N. D. 76, 118 N. W. 820.

Two or more taxpayers of a district, having no unity of interest except such as is common to all the taxpayers, cannot maintain such action. Wood v. Bangs, 1 Dak. 179, 46 N. W. 586.

The city council had the right to amend the original resolution in the manner done. When the legislature gives power to a public body to do a certain public act, it follows that such public body has power to do all things at any and all times necessary to carry out such purpose. Catterlin v. Frankfort, 87 Ind. 50; Peru v. Bearss, 55 Ind. 577; Windman v. Vincennes, 58 Ind. 480; Chandler v. Kokomo, 137 Ind. 295, 36 N. E. 847; Crume v. Wilson, 104 Ind. 583, 4 N. E. 169; Coolman v. Fleming, 82 Ind. 117; Burns v. Simmons, 101 Ind. 557, 1 N. E. 72; Metty v. Marsh, 124 Ind. 18, 23 N. E. 702; McKeen v. Porter, 134 Ind. 483, 34 N. E. 223; Wilcox v. Tipton, 143 Ind. 241, 42 N. E. 616.

Plaintiffs cannot take advantage of an irregularity which in no way is injurious to them. People ex rel. Peck v. Los Angeles, 154 Cal. 220, 97 Pac. 312; People ex rel. Warren v. York, 247 Ill. 591, 93 N. E. 400; People ex rel. Cuff v. Oakland, 123 Cal. 598, 56 Pac. 445; State ex rel. Brown v. Westport, 116 Mo. 582, 22 S. W. 888; McQuillin, Mun. Ord. 314.

Geo. R. Robbins and *Geo. A. Bangs*, for respondent.

The plaintiff, to maintain quo warranto, must have a private interest in the action and in the subject-matter thereof; he must have a claim to the *office* or *franchise*. Wishek v. Becker, 10 N. D. 63, 84 N. W. 590; Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675.

Quo warranto is not the proper proceeding under the circumstances

of this case. High, Extr. Leg. Rem. 618; 2 Spelling, Extr. Relief, § 1802; *People ex rel. Farrington v. Whitcomb*, 55 Ill. 172; *Stultz v. State*, 65 Ind. 492; *North Birmingham v. State*, 166 Ala. 122, 139 Am. St. Rep. 17, 52 So. 202, 21 Ann. Cas. 1123; *Delphi v. Startzman*, 104 Ind. 344, 3 N. E. 937; *Lutien v. Kewaunee*, 143 Wis. 242, 126 N. W. 662, 127 N. W. 942.

Injunction is the proper and adequate remedy. 28 Cyc. 212; 20 Am. & Eng. Enc. Law, 1154; 1 High Inj. §§ 547-1254; 1 McQuillin, Mun. Ord. § 288; 2 Spelling, Extr. Relief, § 1802; High, Extr. Leg. Rem. § 618; *Pueblo v. Stanton*, 45 Colo. 523, 102 Pac. 512; *North Birmingham v. State*, 166 Ala. 122, 139 Am. St. Rep. 17, 52 So. 202, 21 Ann. Cas. 1123; *Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Roswell v. Ezzard*, 128 Ga. 43, 57 S. E. 114; *Hyde Park v. Chicago*, 124 Ill. 156, 16 N. E. 222; *East Springfield v. Springfield*, 238 Ill. 534, 87 N. E. 349; *Morgan Park v. Chicago*, 255 Ill. 190, 99 N. E. 388, Ann. Cas. 1913D, 399; *Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *Stultz v. State*, 65 Ind. 492; *Layton v. Monroe*, 50 La. Ann. 121, 23 So. 99; *Dees v. Lake Charles*, 50 La. Ann. 356, 23 So. 382; *Pittsburg's Appeal*, 79 Pa. 317; *Sample v. Pittsburg*, 212 Pa. 533, 62 Atl. 201; *Lutien v. Kewaunee*, 143 Wis. 242, 126 N. W. 662, 127 N. W. 942; *Wilton v. Pierce County*, 61 Wash. 386, 112 Pac. 386; *Morris v. Nashville*, 6 Lea, 337.

Equity will take jurisdiction, and an injunction will issue to preserve the status pending the rearrangement of territorial boundaries of subordinate governmental agencies. *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282; *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 191; *Brown v. Trent*, 36 Okla. 239, 128 Pac. 895; *Morrill v. Morrill*, 20 Or. 96, 11 L.R.A. 155, 23 Am. St. Rep. 97, 25 Pac. 362; *Burke v. Inter-State Sav. F. & L. Asso.* 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879.

Certiorari was not the proper remedy, for it would only have brought up the *record* to the district court. Rev. Codes 1905, § 7810; *Re Evingson*, 2 N. D. 184, 33 Am. St. Rep. 768, 49 N. W. 733; *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715; 6 Cyc. 789; 4 Enc. Pl. & Pr. 12; *State ex rel. Keller v. County Ct.* 135 Mo. App. 143, 116 S. W. 14; *Highway Comrs. v. Smith*, 217 Ill. 250, 75 N. E. 396.

Many other matters *dehors* the record are here involved. *Lutien v. Kewaunee*, 143 Wis. 242, 126 N. W. 662, 127 N. W. 942.

The mere fact that there may be a remedy at law is not in itself sufficient ground for refusing relief by injunction. 1 High. Inj. § 30, p. 47; *J. K. & W. H. Gilcrest Co. v. Des Moines*, 128 Iowa, 49, 102 N. W. 831; *Hall v. Dunn*, 52 Or. 475, 25 L.R.A.(N.S.) 193, 97 Pac. 811; *Guernsey v. McHaley*, 52 Or. 555, 98 Pac. 158; *Dumont v. Peet*, 152 Iowa, 524, 132 N. W. 955; *Lutien v. Kewaunee*, 143 Wis. 242, 126 N. W. 662, 127 N. W. 942.

The plaintiffs are not guilty of laches, but have been diligent in the protection of their rights. 24 Cyc. 840; 22 Cyc. 777.

The township and school district are trustees of the governmental functions of the state within this territory, and as such have full right to protect themselves from unlawful interference therein. *Hyde Park v. Chicago*, 124 Ill. 160, 16 N. E. 222; *Cicero v. Chicago*, 182 Ill. 301, 55 N. E. 351; *East Springfield v. Springfield*, 238 Ill. 534, 87 N. E. 349; *Morgan Park v. Chicago*, 255 Ill. 190, 99 N. E. 388, Ann. Cas. 1913D, 399; Laws of 1911, chap. 266, § 37; Rev. Codes 1905, §§ 3058-3060; *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499.

The city must exercise the powers delegated to it strictly according to the prescribed methods. All doubts are resolved against the city. *Stern v. Fargo*, 18 N. D. 296, 26 L.R.A.(N.S.) 665, 122 N. W. 403.

Where a person attempts to enforce a right grounded in or flowing out of an office, he must show a legal right to such office. 8 Am. & Eng. Enc. Law, 2d ed. 804.

The filing of the plat or map was an essential part of the annexation proceedings. The failure to file the plat creates the presumption that the law has not been complied with, and the city has failed to overcome such presumption. Rev. Codes 1905, §§ 2827, 7313; *Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co.* 22 N. D. 615, 47 L.R.A.(N.S.) 965, 135 N. W. 189; *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N. W. 834; *Abbott, Trial Ev.* p. 24, § 3; 20 Am. & Eng. Enc. Law, 2d ed. 748, 760 and 767; *Hudson v. Green Hill Seminary Corp.* 113 Ill. 626; *Shaffner v. St. Louis*, 31 Mo. 272; *Hopkins v. Kansas City, St. J. & C. B. R. Co.* 79 Mo. 98; *Orrick School Dist. v. Dorton*, 125 Mo. 439, 28 S. W. 765; *Re Brooklyn W. & N. R. Co.* 72 N. Y. 249;

Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 530; New York Cable Co. v. New York, 104 N. Y. 43, 10 N. E. 332; Harbeck v. Toledo, 11 Ohio St. 219; Welker v. Potter, 18 Ohio St. 85; Chicago City R. Co. v. Allerton, 18 Wall. 233, 21 L. ed. 902; Tulare Irrig. Dist. v. Shepard, 185 U. S. 1, 17, 46 L. ed. 773, 22 Sup. Ct. Rep. 531.

The governmental computations shall be conclusive or *prima facie* evidence of the area of the governmental subdivisions. They are *conclusive* as between the government and private parties; between private parties, after title has passed, they are *prima facie* correct. Heald v. Yumisko, 7 N. D. 422, 75 N. W. 807; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Radford v. Johnson, 8 N. D. 182, 77 N. W. 601; Nystrom v. Lee, 16 N. D. 561, 114 N. W. 478.

Courts will take judicial notice of the area as computed by the government. Rev. Codes 1905, § 7319, subdvs. 48, 49 and 51; 2 Enc. Ev. 972, and 976; Blair v. Brown, 17 Wash. 570, 50 Pac. 483; Keystone Mills Co. v. Peach River Lumber Co. — Tex. Civ. App. —, 96 S. W. 64; Christ v. Fent, 16 Okla. 375, 84 Pac. 1074; Smith v. Rich, 37 Mich. 549; Beeman v. Black, 49 Mich. 598, 14 N. W. 560.

The area of the city must be more than 1,632 acres to warrant the annexation of the area embraced within the original resolution, which was 816.52 acres. Stern v. Fargo, 18 N. D. 296, 26 L.R.A.(N.S.) 665, 122 N. W. 403.

The power to incorporate cities and villages carries the implied limitation that the territory so to be incorporated must be suitable for the purpose. Cooley, Const. Lim. 7th ed. p. 221; State ex rel. Childs v. Minnetonka, 57 Minn. 526, 25 L.R.A. 755, 59 N. W. 972; State ex rel. Childs v. Fridley Park, 61 Minn. 146, 63 N. W. 613; State ex rel. Railroad & W. Comrs. v. Minneapolis & St. L. R. Co. 76 Minn. 469, 79 N. W. 510; State ex rel. Douglas v. Holloway, 90 Minn. 271, 96 N. W. 40; State ex rel. Young v. Harris, 102 Minn. 340, 13 L.R.A.(N.S.) 533, 113 N. W. 887, 12 Ann. Cas. 260; Chicago & N. W. R. Co. v. Oconto, 50 Wis. 189, 6 N. W. 607; State ex rel. Holland v. Lammers, 113 Wis. 411, 86 N. W. 677, 89 N. W. 501; Fenton v. Ryan, 140 Wis. 353, 122 N. W. 756.

The addition of an undue amount of land not used for city purposes would render the extension unreasonable. State ex rel. Childs v. Minnetonka, 57 Minn. 526, 25 L.R.A. 755, 59 N. W. 972; State ex rel. Childs

v. Fridley Park, 61 Minn. 146, 63 N. W. 613; State ex rel. Railroad & W. Comrs. v. Minneapolis & St. L. R. Co. 76 Minn. 469, 79 N. W. 510; State ex rel. Douglas v. Holloway, 90 Minn. 271, 96 N. W. 40; State ex rel. Young v. Harris, 102 Minn. 340, 13 L.R.A.(N.S.) 533, 113 N. W. 887, 12 Ann. Cas. 260; Chicago & N. W. R. Co. v. Oconto, 50 Wis. 189, 6 N. W. 607; Smith v. Sherry, 50 Wis. 210, 6 N. W. 561; State ex rel. Holland v. Lammers, 113 Wis. 398, 411, 86 N. W. 677, 89 N. W. 501; Fenton v. Ryan, 140 Wis. 353, 122 N. W. 756; State ex rel. Patterson v. McReynolds, 61 Mo. 203; State ex rel. Hammond v. Dimond, 44 Neb. 160, 62 N. W. 498; Vestal v. Little Rock, 54 Ark. 321, 11 L.R.A. 778, 782, 15 S. W. 891, 16 S. W. 291; People ex rel. Shumway v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; Cooley, Const. Lim. 7th ed. p. 721; East Dallas v. State, 73 Tex. 370, 11 S. W. 1030; State ex rel. Taylor v. Edison, 76 Tex. 302, 7 L.R.A. 733, 13 S. W. 263; Ewing v. State, 81 Tex. 177, 16 S. W. 872; State ex rel. Major v. Kansas City, 233 Mo. 162, 134 S. W. 1007.

Lands used for hay are lands used for farming purposes. 3 Words & Phrases, 2695; Re Drake, 114 Fed. 231; State v. Kennedy, 98 N. C. 657, 4 S. E. 47; 19 Cyc. 456; Worley v. Naylor, 6 Minn. 192, Gil. 123; People ex rel. Rogers v. Caldwell, 142 Ill. 441, 32 N. E. 691; Williams v. Chicago & N. W. R. Co. 228 Ill. 597, 81 N. E. 1133; 6 Words & Phrases, 5228.

The amended or final resolution passed by the city council is entirely different from the original resolution, and has never been adopted. Peru v. Bearss, 55 Ind. 576; Wilcox v. Tipton, 143 Ind. 241, 42 N. E. 614; Pittsburg's Appeal, 79 Pa. 317.

The legislature cannot *delegate* its *power* to *make* a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. Glaspell v. Jamestown, 11 N. D. 88, 88 N. W. 1023; Locke's Appeal, 72 Pa. 498, 13 Am. Rep. 716; State ex rel. Dome v. Wilcox, 45 Mo. 464.

The annexation of territory to a city, or the extension of the boundaries thereof, in law is the incorporation of the annexed territory. State ex rel. Johnson v. Clark, 21 N. D. 526, 131 N. W. 715; Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023; Dill. Mun. Corp. 5th ed. 355; Topeka v. Dwyer, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239;

People ex rel. Scholler v. Long Beach, 155 Cal. 604, 102 Pac. 664; Ex parte Pritz, 9 Iowa, 30; McGregor v. Baylies, 19 Iowa, 43; State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818.

The law in question is special, private, and local legislation. Cooley, Const. Lim. 7th ed. 163, 166 and 171; State v. Copeland, 66 Minn. 315, 34 L.R.A. 777, 61 Am. St. Rep. 410, 69 N. W. 27; Pacific Junction v. Dyer, 64 Iowa, 38, 19 N. W. 862; State v. Williams, 158 N. C. 610, 40 L.R.A.(N.S.) 279, 73 S. E. 1000; State ex rel. Bump v. Omaha & C. B. R. & Bridge Co. 113 Iowa, 30, 52 L.R.A. 315, 86 Am. St. Rep. 357, 84 N. W. 983.

Boundaries of a city or municipality are essential; they must be clearly and accurately defined. 20 Am. & Eng. Enc. Law, 2d ed. 1148; Roswell v. Ezzard, 128 Ga. 43, 57 S. E. 114; Warren v. Branan, 109 Ga. 835, 35 S. E. 383; Western P. R. Co. v. Southern P. Co. 80 C. C. A. 606, 151 Fed. 376; Little Rock v. Parish, 36 Ark. 172; People ex rel. Adams v. Oakland, 92 Cal. 611, 28 Pac. 807.

The defining of the territory fixing the boundaries thereof is a legislative act. Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023; State ex rel. Johnson v. Clark, 21 N. D. 526, 131 N. W. 715; State ex rel. Holland v. Lammers, 113 Wis. 416, 86 N. W. 677, 89 N. W. 801.

The acts of the council were illegal and void. Prince George's County v. Bladensburg, 51 Md. 465; Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820; State ex rel. Mueller v. Thompson, 149 Wis. 488, 43 L.R.A.(N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774.

In changing the boundaries of a municipal corporation, the legislative power is exercised; it is an incident of incorporation, and an amendment to the charter. Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023; State ex rel. Johnson v. Clark, 21 N. D. 517, 131 N. W. 715; Topeka v. Dwyer, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239; People ex rel. Scholler v. Long Beach, 155 Cal. 604, 102 Pac. 664; Ex parte Pritz, 9 Iowa, 30; McGregor v. Baylies, 19 Iowa, 43; State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818.

The legislature may not delegate its legislative power, except as to local matters, to municipal corporation for local self-government.

Const. § 25; Cooley, Const. Lim. 7th ed. 65, 165 and 261; 8 Cyc. 830; Erskine v. Nelson County, 4 N. D. 66, 27 L.R.A. 696, 58 N. W. 348; Doherty v. Ransom County, 5 N. D. 1, 63 N. W. 148; Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023; State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; Morton v. Holes, 17 N. D. 154, 115 N. W. 256; People ex rel. Bolt v. Riordan, 73 Mich. 508, 41 N. W. 482; State ex rel. Atty. Gen. v. O'Neill, 24 Wis. 153; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; Re North Milwaukee, 93 Wis. 616, 33 L.R.A. 638, 67 N. W. 1033; State ex rel. Williams v. Sawyer County, 140 Wis. 634, 123 N. W. 248; State v. Great Northern R. Co. 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; State ex rel. Young v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425; Brenke v. Belle Plaine, 105 Minn. 84, 117 N. W. 157; Merchants' Exch. v. Knott, 212 Mo. 616, 111 S. W. 565; State v. Butler, 105 Me. 91, 24 L.R.A.(N.S.) 744, 73 Atl. 560, 18 Ann. Cas. 484; State ex rel. Hahn v. Young, 29 Minn. 474, 9 N. W. 737; State ex rel. Luley v. Simons, 32 Minn. 540, 21 N. W. 750; Bowles v. Landaff, 59 N. H. 192; Gould v. Raymond, 59 N. H. 276; Re Griner, 16 Wis. 424; Smith v. Janesville, 26 Wis. 291; Slinger v. Henneman, 38 Wis. 504; Ryan v. Outagamie County, 80 Wis. 336, 50 N. W. 340; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; Re North Milwaukee, 93 Wis. 616, 33 L.R.A. 638, 67 N. W. 1033; State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; Adams v. Beloit, 105 Wis. 363, 47 L.R.A. 441, 81 N. W. 869; State ex rel. Boycott v. LaCrosse, 107 Wis. 654, 84 N. W. 242; State ex rel. Holland v. Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; Borgman v. Antigo, 120 Wis. 296, 97 N. W. 936; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Nash v. Fries, 129 Wis. 120, 108 N. W. 210; State ex rel. Faber v. Hinkel, 131 Wis. 103, 111 N. W. 217; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; State ex rel. Williams v. Sawyer County, 140 Wis. 634, 123 N. W. 248; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; State ex rel. Mueller v. Thompson, 149 Wis. 488, 43 L.R.A.(N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774.

Under the constitutional authority, it is universally held that the

charter cannot authorize its own amendment so as to provide for the annexation of territory; the general law enacted by the legislature controls. *People ex rel. Connolly v. Coronado*, 100 Cal. 571, 35 Pac. 162; *People ex rel. Cuff v. Oakland*, 123 Cal. 598, 56 Pac. 445; *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923; *People v. Ontario*, 148 Cal. 625, 84 Pac. 205; *People ex rel. Peck v. Los Angeles*, 154 Cal. 228, 97 Pac. 311; *People ex rel. Scholler v. Long Beach*, 155 Cal. 604, 102 Pac. 664; *State ex rel. Snell v. Warner*, 4 Wash. 773, 17 L.R.A. 263, 31 Pac. 25; *State ex rel. Anderson v. Tillamook*, 62 Or. 332, 124 Pac. 637; *Thurber v. McMinnville*, 63 Or. 410, 128 Pac. 43; *Landess v. Cottage Grove*, 64 Or. 155, 129 Pac. 537.

A conditional or alternative law must be complete in itself, and not leave a question of public policy or legislative discretion to any person or board. *Cooley*, Const. Lim. 7th ed. 164; *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023; *State ex rel. Rusk v. Budge*, 14 N. D. 532, 105 N. W. 724; *Morton v. Holes*, 17 N. D. 154, 115 N. W. 256; *State v. Great Northern R. Co.* 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; *State ex rel. Williams v. Sawyer County*, 140 Wis. 634, 123 N. W. 248; *Re North Milwaukee*, 93 Wis. 617, 33 L.R.A. 638, 67 N. W. 1033; *State ex rel. Pearson v. Hayes*, 61 N. H. 264; *Locke's Appeal*, 72 Pa. 498, 13 Am. Rep. 716; *Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 395.

The act in question grants to the city the power to absorb and dissolve adjacent municipalities. It is in violation of the rights of the inhabitants of such adjacent territory. *Cooley*, Const. Lim. 7th ed. 65, 165 and 261; *Vallelly v. Park Comrs.* 16 N. D. 25, 15 L.R.A. (N.S.) 61, 111 N. W. 615; *Morton v. Holes*, 17 N. D. 154, 115 N. W. 256; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *People ex rel. Bolt v. Riordan*, 73 Mich. 508, 41 N. W. 482; *State ex rel. Pearson v. Hayes*, 61 N. H. 264; *Gould v. Raymond*, 59 N. H. 276.

SPALDING, Ch. J. (after stating the facts as above). The appellants submit six reasons why it is contended that the judgment should be reversed:

1. That the question is political, and therefore not cognizable judicially.

In general, the method and desirability of extending corporate limits are legislative questions. They relate to the public interests, and whether they will be subserved by the creation of a municipality or the extension of its limits, and, in so far as the expediency or wisdom of the annexation in question was involved, the legislature delegated the power to determine such questions, under certain limitations, to the city council of Grand Forks; but those questions are at most only indirectly involved in the present proceeding.

The question as to whether the power conferred upon the city council has been legally exercised, whether the statute under which it acts is constitutional, what the effect of any irregularities or omissions in pursuing the method prescribed by the statute may be, and other similar questions, are for judicial determination. The creation or extension is a legislative or political function, but courts may determine what are the corporate limits already established, whether what is claimed to be a corporation is a corporation, and whether the legislative authority has been exceeded by the city in its attempts to extend its boundaries. *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023. To the cited case we make reference for a more exhaustive discussion of this question, which need not be repeated here. In the case at bar, the main questions, and those only which we find it necessary to decide, relate to the validity of the proceedings, and not to the policy of annexation, hence this point cannot be sustained. See also *Pueblo v. Stanton*, 45 Colo. 523, 102 Pac. 512.

2. The next point made by appellant is that questions for determination in this action are not proper subjects for consideration in equity; in other words, that either quo warranto or certiorari is the proper remedy, and that injunction cannot be availed of.

(a) As to quo warranto. Sec. 7351, Rev. Codes 1905, says: "An action may be commenced by the state, or any person who has a special interest in the action, against the parties offending, in the following cases: 1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authorities of this state. . . . " The relators are duly elected and qualified officials of the city of Grand Forks. They are not usurpers in the offices which they fill. Neither have they intruded themselves into such

offices, and there is no claim that they are unlawfully holding or exercising the offices to which they were elected, and for which they qualified. No one has asserted a right to fill the same offices or either of them.

The substance of the respondents' contention is that the complaint alleges that they exceeded their jurisdiction by doing, and threatening to do, franchise acts beyond the limits of the city of Grand Forks, over territory claimed by respondents to have been illegally annexed to that city; that they are charged with going outside the limits of the city of Grand Forks to exercise their offices, to wit, into territory belonging in a certain township and a separate school district, and upon premises of private individuals, the result of which will be that the domicile of residents of the territory attempted to be annexed will be changed from the municipality of Falconer township into the city of Grand Forks, and from School District 59 into the school district comprised in the city; that thereby their relations to municipal affairs will be changed, and the burden of taxation enormously increased, and all without warrant of law, or at least without compliance with the law which has been enacted, fixing the methods to be pursued to bring about such changes.

We are of the opinion that the section in question, which is the one relating to proceedings in the nature of quo warranto, was not intended to correct an abuse of excess in the use of an office or franchise; that the legislative intent was to provide a method of removing one from an office, who was a usurper therein, and to prevent the usurpation of a franchise; that is, to prevent the exercise of a franchise not in existence. These officials and their acts are not of such character as to bring them within the terms of this section, but if the proceedings by which it is claimed the additional territory was annexed to the city of Grand Forks are invalid, they are simply going outside the territory over which they have jurisdiction, and performing acts under color of law which are unofficial and void, if not ratified.

Our conclusions are supported by the consideration of other sections of our Code. Sec. 7353 provides for setting forth the name of the person rightfully entitled to the office, in addition to the other allegations of the complaint in quo warranto, with a statement of the right of such person to the office, and for the arrest of the usurper. Sec. 7354 provides that in every such case judgment shall be rendered

upon the right of the defendant and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require. This latter phrase is undoubtedly incorporated in the section with reference to actions wherein the court may find that neither party is entitled to the office. Sec. 7355 provides for the qualification of the complainant when he is found to be entitled to the office, and for his making a demand for the books and papers belonging to the office from which he may have been excluded. Sec. 7356 makes the defendant in such case, if he refuses or neglects to deliver the official property on demand, guilty of a misdemeanor, and provides how the prevailing party shall be put in possession. Other sections, which need not be here referred to, have more or less bearing upon the subject, and shed some light on it.

The identical question involved in the case at bar was passed upon in *North Birmingham v. State*, 166 Ala. 122, 139 Am. St. Rep. 17, 52 So. 202, 21 Ann. Cas. 1123. Proceedings in the nature of quo warranto were brought in the name of the state on the relation of private citizens against the city of North Birmingham and its officers, to test the validity of the extension of the corporate limits made by an order and decree of the probate court. Sec. 5453 of the Code of 1907 of Alabama was identical in substance with § 7351, Rev. Codes 1905 of North Dakota. In that case the information and proof showed that the respondents were legal officers of North Birmingham, and the complaint was that they were exceeding their jurisdiction by doing, or threatening to do, charter or franchise acts beyond the limits of North Birmingham, over territory which it was claimed had been illegally annexed to North Birmingham. The court says: "This would not be the unlawful holding or exercise of a public office, or the unlawful holding or exercise of a franchise. They are properly in office, and the franchise that they are using is not questioned, nor are the acts complained of unauthorized. They are merely charged with going beyond the limits of jurisdiction in the exercise of an office of franchise. Sec. 5453 was not intended to correct a mere abuse or excessive use of an office or franchise, but to remove a usurper from an office or to prevent the use of a franchise which did not exist. . . . The manifest purpose of the present information is to test the validity of the annexation of certain territory to North Birmingham, and to restrain the respondents from exercising

acts over same,—not to oust them from the exercise of a franchise. . . . If the respondents are exceeding their jurisdiction or authority, this may be checked by an appropriate proceeding, but not by a quo warranto to test their title to an office or right to a franchise. Here, the franchise exists, and the respondents are only charged with an excessive use of same, and are sought to be enjoined from using same in a certain way, and not that they be ousted from said franchise. . . . It seems well settled by the great weight of authority that where city authorities assume to exercise mere corporate powers beyond the territorial boundaries of the corporation, the remedy is not quo warranto, but injunction.”

In *Lutien v. Kewaunee*, 143 Wis. 242, 126 N. W. 662, 127 N. W. 942, the same question was also passed upon. It was there said “quo warranto is manifestly inappropriate.”

We do not decide whether the state might institute and maintain proceedings in the nature of quo warranto directed at the city of Grand Forks as a corporation, as this is not an action by the state, but one by parties having a special interest in the subject.

(b) It is manifest that certiorari is not the proper remedy. The writ of certiorari goes to the record made by the inferior court, board, or tribunal, and if, as in the case at bar, facts are alleged which may be essential to a determination of the proceeding outside the record, they cannot be reached by the writ. In the instant case, the complaint alleges numerous acts and facts not disclosed by the record of the proceedings in the city council of Grand Forks. Among such questions are the area of the original city and the area of the included tracts, as the statute fixes a limit of the amount of territory which may be annexed with relation to the territory included in the city, and the question as to the character of the territory is also raised, that is, whether farming, pasturing, or what.

In *Lutien v. Kewaunee*, *supra*, it was held that certiorari would not reach the question of the number of electors and landowners in the annexed district, which, under the Wisconsin statute, was a material question.

(c) From what has already been said relating to the writs of quo warranto and certiorari, it is evident that injunction is a proper remedy. That it is so is supported by numerous authorities, which we need not

review at great length. We, however, make reference to a few of the many.

In *Lutien v. Kewaunee*, *supra*, the question arose as to the legality of an attempted annexation of territory to the city of Kewaunee. Owners of real estate in the annexed territory brought suit on behalf of themselves and of other property owners and taxpayers similarly situated, to enjoin the city officials from levying any taxes upon their real estate, and from exercising any acts of jurisdiction over the territory sought to be annexed, and to enjoin the city clerk from making out and delivering a tax roll and tax warrant including such real estate, and the city treasurer from collecting or attempting to collect taxes on the same. What were claimed to be jurisdictional defects in the proceedings were alleged as grounds for the action prayed for, and that learned court held that the remedy was in equity, and cited authorities sustaining its conclusions. The reasoning and conclusion of that court sustains the right of the plaintiff brick company to maintain the action in the case at bar.

See also *High on Injunctions*, § 1254. That author lays down the rule that where the proceedings of a municipal corporation, in the annexation of adjacent territory to the municipality, are in excess of the corporate power and authority, they may be enjoined at the suit of a citizen and taxpayer whose taxes would be increased by the proposed action, and that property owners of such territory, suing in behalf of themselves and all others similarly situated, may enjoin such illegal annexation, both upon the ground of preventing illegal taxation and to prevent a change of the property of citizens from the territorial limits of one municipality or political body to those of another, and that, when the proceedings of a board of municipal officers for annexing contiguous territory are wholly void by reason of noncompliance with the statute conferring the jurisdiction, taxes assessed upon the land may be enjoined.

McQuillin, on *Municipal Corporations*, vol. 1, § 288, states that citizens and taxpayers may institute the appropriate proceeding to test the legality of the annexation or detachment of territory, *e. g.*, injunction; that when a petition for annexation is not signed as required by statute, the property owner within such territory may enjoin the execution of an ordinance for an election founded upon the petition; that

taxpayers may test the validity of proceedings annexing territory by injunction against the collection of taxes on their property by the city.

It is held in *Pueblo v. Stanton*, 45 Colo. 523, 102 Pac. 512, that proceedings for the annexation of territory, exceeding the corporate authority, will be enjoined at the suit of the property owner. See also *Wilton v. Pierce County*, 61 Wash. 386, 112 Pac. 386.

In *Pittsburg's Appeal*, 79 Pa. 317, it is held that a private citizen may maintain a bill to restrain the city from carrying into operation an ordinance to annex territory to the city. That court says: "The right of a private citizen to maintain a bill such as that upon which this case is founded is hardly open for argument. So many are the cases in which such bills have been sustained, one might suppose this matter to be no longer open for debate." That court refers to certain cases, and says that it was held "that the interest of a taxpayer, when money is to be raised by taxation or expended from the treasury, is sufficient to entitle him to maintain a bill to test the validity of the law which proposes the assessment or expenditure. If, then, such an interest be sufficient to enable one to test the validity of an election law, which at most could increase his tax to but a trifling degree, *a fortiori* shall one like the plaintiff, who is threatened by most burdensome impositions, have the power thus to inquire into the right by which the councils of Pittsburg propose to act in subjecting his person and property to their jurisdiction, for the purposes of municipal government and taxation."

In *Sample v. Pittsburg*, 212 Pa. 533, 62 Atl. 201, the legality of a proposed annexation of the city of Allegheny to the city of Pittsburg was passed upon, and it was held that citizens and taxpayers of Allegheny city might maintain a bill in equity to restrain the city of Pittsburg and its municipal officers from taking any proceedings under the act of April 20, 1905, to annex the city of Allegheny to the city of Pittsburg.

In *Roswell v. Ezzard*, 128 Ga. 43, 57 S. E. 114, it is held that, at the instance of a resident citizen and taxpayer, equity will restrain proceedings instituted under color of law, but which are illegal, the effect of which is designed to change his domicile from one political subdivision to another. The court said: "A court of equity will not turn a deaf ear to his complaint that the municipality, under color of

law, is attempting to change his domicil, and require him to meet each new condition resulting from such attempt, by a separate proceeding, . . . when all of these and sundry other complications may be avoided by the grant of an injunction."

See also High, Extr. Legal Rem. § 618, and Layton v. Monroe, 50 La. Ann. 121, 23 So. 99; 28 Cyc. 212; Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937; Osmond v. Smathers, 62 Neb. 509, 87 N. W. 310; Eskridge v. Emporia, 63 Kan. 368, 65 Pac. 694; Windham v. Vincennes, 58 Ind. 480.

In Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937, it was held that, where the complainant was seeking to prevent the city from carrying into effect an illegal order for the annexation of territory within which his lots were situated, there was an attempt to interfere with property rights under color of legal authority, and that injunction was the appropriate remedy.

In Hyde Park v. Chicago, 124 Ill. 156, 16 N. E. 222, the validity of an attempted annexation of the village of Hyde Park to the city of Chicago was considered and passed upon, and it was held that, inasmuch as the property of an unincorporated village was in the nature of a trust fund, which the corporate authorities held for the use of the public, and any unlawful interference with it was calculated to inflict irreparable injury upon the community, it presented a clear case for equitable relief. That injunction will lie, see also East Springfield v. Springfield, 238 Ill. 534, 87 N. E. 349; and Morgan Park v. Chicago, 255 Ill. 190, 99 N. E. 388, Ann. Cas. 1913D, 399.

The above are a few of the authorities sustaining the contention of respondent that injunction is a proper remedy in the case at bar. We have examined all the authorities cited by appellant, a few of which are more or less in point, and it may be conceded that there is a conflict in the authorities, largely by reason of a failure on the part of some courts to make pertinent distinctions. Although we deem the great weight of authority to sustain the contention of respondent, we do not need to go outside the decisions of own court on the question. We have only done so because of the careful and extensive investigation the subject has been given by counsel and the elaborate arguments made.

We deem Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191, and Northern P. R. Co. v. McGinnis, 4 N. D. 494, 61 N. W.

27 N. D.—3.

1032, in point, so far as tax proceedings relating to taxes on real property are in question, but the recent case of *Baker v. LaMoure*, 21 N. D. 140, 129 N. W. 464, is direct authority sustaining our conclusion. It was there held that an allegation showing in effect that a proposed assessment against the plaintiff's property would be illegal was sufficient to show that the plaintiff had such interest as to entitle him to the interposition of a court of equity, inasmuch as, if not restrained, his property would be encumbered by a lien in excess of what it would be if the council had not exceeded its authority. See also *Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County*, 11 N. D. 107, 90 N. W. 260; *Schaffner v. Young*, 10 N. D. 245, 86 N. W. 733, wherein it is held that courts of equity will intervene, even in personal property cases, where a tax is imposed by officers acting outside of their territorial jurisdiction.

We conclude that plaintiffs sought the remedy applicable to the facts pleaded in this case.

3. It is urged by appellant that plaintiffs have, by their delay in instituting these proceedings, acquiesced in the action of the city council to such an extent as to estop them from asserting that they have not been legally incorporated within the city limits of Grand Forks. The resolution of annexation was adopted October 23, 1911. This proceeding was instituted on the 11th of March, 1912. We find no acts done by the city or its officials in the meantime of sufficient importance to justify the court in holding that a delay of little over four and one-half months in instituting the proceedings estops the plaintiffs. In determining this question, consideration must be given, not only to the time which elapsed, but to the acts done by the city and its officials, and the seriousness of the injury complained of by the plaintiffs. The city prepared and filed a map, and enacted an ordinance, including the annexed territory in certain election precincts, and called an election, but this suit was commenced before the election. We hold that plaintiffs were not estopped.

4. It is next urged that School District 59 and the township of Falconer are not proper parties plaintiff. This question is really immaterial, because it is clear that the brick company is a proper plaintiff, and if one of the parties is so, then the action cannot be dismissed, but on the authority of the Illinois cases heretofore cited, we

are satisfied that both the school district and the township, as such, had sufficient interest in the matter in controversy to sustain the right to complain. It would reduce their revenue, and raise the rate of taxation materially, and as to the school district might seriously interfere with the conduct of the schools by reducing the number of pupils and otherwise disarranging its affairs.

5. The next and most serious question raised is as to the validity of the acts of the city council in the attempted annexation. Under § 2825, Rev. Codes 1905, as amended by chap. 58, Laws of 1909, any city may so extend its boundaries as to increase its territory, not to exceed one half its present area, by resolution of the city council passed by two thirds of the entire members elect.

Sec. 2826 of the same chapter requires the resolution referred to to be published in the manner therein set forth, and copies thereof to be posted in five of the most conspicuous places within the territory proposed to be annexed, and authorizes and provides that the territory described in such resolution shall be included within, and become a part of, the city, unless a written protest signed by a majority of the property owners of the proposed extension is filed with the city clerk or auditor within ten days after the last publication of such resolution. It further provides that, if such written protest is filed, the council shall hear testimony offered, make a personal inspection of the territory, when, if it is the opinion that such territory ought to be annexed, and if, by resolution passed by two thirds of the entire members elect, it shall order such territory to be included within the city, it shall then make and cause an order to be made and entered, describing the territory annexed, whereupon the territory described in such resolution shall be included and become a part of the city, with the proviso that, if the greater portion of such territory is used for farming and pasturage purposes, then such territory shall not be annexed.

It appears in this case that, after the adoption of the preliminary resolution, the publication and posting of the notices required, protests were signed and filed. The matter was considered, a personal inspection made by the council, whereupon, without further notice, a resolution was adopted amending the original resolution by striking out a considerable portion of the territory therein described and included, and the resolution as so amended was in substance adopted in the manner

provided by the statute. The question is, Was it not necessary to publish and post notices of the proposed extension of the boundaries of the city, after the protests were filed and heard on the original contemplated extension, and describing the territory actually annexed? Incidentally, and preliminary to a determination of this question, we may observe that this court has heretofore announced its construction of the law regarding the powers of cities. In *Stern v. Fargo*, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403, we held it to be well settled that incorporated cities have only the following powers: 1, Those granted in express words; 2, those necessarily implied or incident to the powers expressly granted; 3, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable; 4, that doubtful claims of power, or doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. And equally applicable is the language of this court in the recent case of *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, wherein it was said: "It must be borne in mind that the proceedings for the division of a county and the organization of new counties are strictly statutory, and no intendment can be indulged in their favor. It is no doubt true that the statute must receive a liberal construction to the end that the legislative intent may be given effect, but where such intent is reasonably apparent, it is incumbent upon those who seek to interfere with existing county organizations by the creation of new counties, to at least substantially conform to the requirements of the statute." It would thus appear that, if there is any ambiguity in the language of § 2826, it should be resolved against the power of the city; but our determination of this question need not rest upon this conclusion.

It is a fundamental element of American jurisprudence that parties are entitled to notice and hearing before their situation can be changed in a legal proceeding to their detriment, and before they can be deprived of their property or other rights. It can hardly be doubted that, with the change from one municipality to another, the increase in the rate of taxation which would necessarily follow, and the added burdens incident to becoming a part of a city as compared with those incident to the township, are material to the rights of the parties affected. They were given notice by the council of a contemplated change, and an opportunity was afforded them to enter their protest. This they did,

but their protests only related to the territory first proposed for annexation to the city. Those protests were presumably made by those objecting to the inclusion of the territory described in the notice. We cannot presume that their objections were the same that they would have been, had the original notice only included the territory described in the final resolution. Neither can we assume that other parties might not have objected to the inclusion of the territory included in the smaller acreage, who did not object to the total. They had a right to protest against the acts which were in fact consummated by the council. They never had such an opportunity. They were not notified that only a fraction of the territory as advertised was to be annexed. They had no opportunity to protest as to that territory. By the change the city council lost jurisdiction, if it ever acquired it, to make the annexation. It did so without notice to those interested in the contemplated annexation. Notice of the contemplated change did not furnish notice of the change made.

This statute, if valid, grants to cities most extraordinary power, by permitting city councils to annex territory in direct opposition to the wishes and protests of all the people whose interests are to be affected, and if there is reason for a strict construction of any statute, it may certainly be found in a case of this kind, and the city should be required to give the interested parties such, and all the notice that the statute prescribes, as a prerequisite to a valid annexation.

The city has attempted to exert against the complainants the power derived from a statute and granted upon a condition, which condition is, that the conditions precedent prescribed by the statute shall be complied with. This is essential. The fact that the resolution, as at first adopted, included a small portion of territory already within the limits of the city, doubtless by mistake, is immaterial. It included other territory which was not within the city limits at that time, and which was not included in the final action of the city council. No order has been made by the council annexing the territory covered by the original resolution, and of which the interested parties had notice, and the fact that the members of the city council acted in good faith, which is not denied, is immaterial. The statute is that, "if no written protest is filed, the land therein described becomes a part of the city." "Therein described" relates to the original resolution, and the description of

land which it contains and which is given in the notice published and posted. When the resolution is attempted to be amended and the acreage changed, the council is acting upon a different proposition from the one which the owners and taxpayers have been given an opportunity to protect themselves against.

Nowhere in the statutory provision do we find anything indicating that anything different from the whole of the territory as to which notice is given may be substituted for that contained in the notice and resolution. Under the proviso we find that, if the character of a portion of said territory consists of land used for farming or pasturage purposes, "then" said territory shall not be annexed. This refers to the whole territory proposed for annexation, and, as we have heretofore indicated, the fact that if farming lands were included in the original resolution in a sufficient quantity to defeat the annexation, parties aware of that fact might, for that reason alone, refrain from going to the trouble of entering a protest, which they would have done, had it not been included. It would have been a simple matter for the legislature to have clearly indicated its intention to grant to the city the power to annex part only of land described, if it had intended to grant this power. It has not done so. In further support of our conclusion, see *Peru v. Bearss*, 55 Ind. 576, where it is held that, inasmuch as the entire proceedings for annexation of contiguous territory to incorporated cities are statutory proceedings, to make them operative and give them validity, it is essentially necessary that all proceedings be in strict conformity with the provisions and requirements of the statute.

For the reasons stated, it is clear to the members of this court, that the attempted annexation was invalid, and that the judgment of the trial court should be affirmed. Respondents suggest and argue other reasons for sustaining the judgment, and particularly and strenuously argue that the statute under which the attempt to annex was made is unconstitutional. In view of our conclusions stated above, it is unnecessary to pass upon other questions, and, while we entertain serious doubts of the validity of the statute, we cannot, with propriety, under the precedents, pass upon this, when not necessary to do so.

DAKOTA SASH & DOOR COMPANY v. HELENA W. BRINTON,
J. W. Brinton, J. R. Waters, Harriet Dvorak.

(145 N. W. 594.)

Mechanics' lien — foreclosure action — answer — cross complaint — asserting lien — may also foreclose.

In a mechanics' lien foreclosure action a party defendant may, under § 6245, Rev. Codes 1905, by answer or cross complaint, assert and procure foreclosure of a lien upon the premises in suit; and this independent of any relief sought against the plaintiff, and even though such defendant admits the claim of the plaintiff in its entirety. Section 6860, Rev. Codes 1905, defining the requisites of counterclaims, has no application to causes of action voluntarily joined or consolidated under § 6245, Rev. Codes 1905, defining procedure under mechanics' lien foreclosures.

Opinion filed February 10, 1914.

From a judgment of the District Court of Billings County, now Golden Valley County, *Crawford, J.*, entered after motion to strike, and the subsequent overruling of a demurrer of the owner defendant, the owner appeals.

Affirmed.

R. M. Andrews, for appellants.

A counterclaim must be such a claim in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the case. Rev. Codes 1905, § 6860; 1 Pom. Code Rem. §§ 752-755, pp. 816-820; Sutherland, Pl. & Pr. § 627, p. 373, lines 1, 11, § 628, lines 1, 2, and portion of 3, and cases cited.

The defendant could not in this action ask for and obtain affirmative relief against plaintiff. Pom. Code Rem. §§ 752, 753; Rev. Codes 1905, § 6860.

Stambaugh & Fowler, for respondents.

This is an equitable action, and the relief sought by defendant is equitable relief. *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058; *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 47; *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Volker-Scowcroft Lumber Co. v. Vance*, 36 Utah, 346, 24 L.R.A. (N.S.) 321, 103 Pac. 970, Ann.

Cas. 1912A, 124; Davis v. Alvord, 94 U. S. 545, 24 L. ed. 283, 9 Mor. Min. Rep. 384; Curnow v. Happy Valley Gravel & H. Co. 68 Cal. 262, 9 Pac. 149; Gilchrist v. Helena, H. S. & Smelter R. Co. 58 Fed. 708; Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352; Washington Iron Works Co. v. Jensen, 3 Wash. 584, 28 Pac. 10 ; Ainsworth v. Atkinson, 14 Ind. 538; Murray v. Rapley, 30 Ark. 568; Henderson v. Sturgis, 1 Daly, 336; Miller v. Moore, 1 E. D. Smith, 739; San Juan & St. L. Min. & Smelting Co. v. Finch, 6 Colo. 214; Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 Pac. 414, 420.

If an answer in such a case states facts necessary to show a cause of action for a cross complaint, it is immaterial how it is *named*. In this case the defendant by his answer set up another lien against the property, in his favor. Bank of Iowa & Dakota v. Price, 9 S. D. 582, 70 N. W. 836; Burgi v. Rudgers, 20 S. D. 646, 108 N. W. 253; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398, 645; Sharon Town v. Morris, 39 Kan. 377, 18 Pac. 230; Kenney v. Apgar, 93 N. Y. 539; Volker-Scowcroft Lumber Co. v. Vance, 36 Utah, 346, 24 L.R.A.(N.S.) 321, 103 Pac. 970, Ann. Cas. 1912A, 124; Burns v. Phinney, 53 Minn. 431, 55 N. W. 540; 27 Cyc. 393.

Any number of persons claiming liens against the same property may join in the same action, and this provision of our Code is broad enough to include a *mortgage lien* as well as a mechanics' lien. Rev. Codes 1905, §§ 6815, 6245; Erickson v. Russ, 21 N. D. 208, 32 L.R.A.(N.S.) 1072, 129 N. W. 1025.

Goss, J. Plaintiff, the Dakota Sash & Door Company, a corporation, filed its lien for building materials furnished Leeby, a building contractor, upon a building and lots owned by Helena W. Brinton, wife of defendant J. W. Brinton. Plaintiff seeks foreclosure of this mechanics' lien, amounting to \$997.60 and interest, by a foreclosure sale of the premises liened; that his lien be declared a first and superior lien upon said property to a mortgage thereon held by defendant Waters and his assignee, defendant Dvorak, and superior to a mechanics' lien filed by the North Star Lumber Company, a corporation, for materials furnished by it. A personal judgment is also asked against the con-

tractor Leeby, for any deficiency remaining unsatisfied after the sale of the lien property. Defendants Brinton, Waters, and Dvorak filed separate answers to plaintiff's complaint. So, also, did defendant Leeby, principal contractor, who therein admits plaintiff's right to a lien and its foreclosure, and avers his construction of the building as principal contractor for the defendants Brinton; that the North Star Lumber Company has perfected its lien on the premises, and is entitled to a lien for materials furnished; and that after its perfection of its lien, he, Leeby, paid the amount thereof to the North Star Lumber Company, who assigned the same to him; that in addition thereto he, as principal contractor, has filed his own lien for work performed and materials furnished under the building contract between the owners Brinton and himself, pursuant to which the building has been erected and was completed; and he asks judgment for the foreclosure of the three liens, that of plaintiff, the North Star Lumber Company, assigned to himself, and his own, aggregating \$2,734.51, with the usual prayer for deficiency judgment and execution thereon against the defendant Helena W. Brinton, owner of the premises. He also asks that the mechanics' liens sought to be established be declared superior to any lien by mortgage held by Waters or Dvorak. To this cross bill of Leeby, defendants H. W. and J. W. Brinton, Waters, and Dvorak interposed their motion for dismissal of defendant Leeby's so-called counterclaim, and that the same be stricken from the records, "upon the grounds and for the reason that the same is not a proper counterclaim in this cause, in accordance with the provisions of § 6860, Revised Codes of North Dakota, in that the same does not arise from any contract or transaction at any time existing between the plaintiff and the defendant, nor connected with the subject-matter of this action." Upon the denial of their motion, they filed a demurrer to said cross bill, "upon the ground and for the reason that the purported counterclaim stated in the separate answer and counterclaim of the defendant Leeby does not state facts sufficient to constitute a cause of action; and further, for the reason that the court has no jurisdiction of the subject of the action in said purported counterclaim." This demurrer was overruled. These defendants then elected of record to stand on their demurrer. Thereupon plaintiff corporation and defendant Leeby submitted their proof upon which the court made and filed findings and conclusions, as a

basis for the judgment entered foreclosing the liens. The defendants H. W. and J. W. Brinton, J. R. Waters, and Harriet Dvorak appeal, and urge only the propriety of the order refusing to strike out the counterclaim and that overruling the demurrer.

The question of law for determination is stated in the brief of the appellants themselves to be as follows: "The sole question involved in this case is whether or not the counterclaim of the defendant Leeby is made under the provisions of the statute governing the counterclaim, to wit, § 6860 of the Revised Codes of North Dakota, requiring that the counterclaim 'must be one existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the case.'" More directly stated, appellants claim that Leeby is counterclaiming under the provisions of § 6860, Rev. Codes 1905, and that such counterclaim must fail because no judgment can be rendered in favor of defendant Leeby against his subcontractor, the plaintiff corporation, as must be the case under the provisions of that section governing counterclaims, in order to permit of a valid counterclaim.

The answer to this contention is that Leeby is not counterclaiming in the sense or within the terms of § 6860, but instead his equitable cross complaint is based upon the provisions of § 6245, Rev. Codes 1905, providing: "Any person having a lien by virtue of this chapter [mechanics' liens] may bring an action to enforce the same in the district court in the county or judicial subdivision in which the property is situated, and any number of persons claiming liens against the same property may join in the same action; and when separate actions are commenced the court may consolidate them. Whenever in the sale of the property subject to the lien there is a deficiency of the proceeds, judgment may be entered for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages." This provision is in no sense limited by, nor has it any reference to, § 6860, Rev. Codes 1905, governing counterclaims. This court in the early decisions has held the rights conferred by the mechanics' lien law to be a statutory right of lien, coupled with a statutory remedy for its enforcement. Or, as is said in *James River Lumber Co. v. Danner*, 3 N. D. 470, 57 N. W. 343: "Along with this statutory right goes the statutory remedy. The two are inseparably connected."

However, in *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. 64, and again in *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288, this court has distinguished the property right obtained by the filing of a lien from the remedy, *i. e.*, the procedure to enforce it, as was necessary to do in both of those cases, particularly in the latter one. We have to do with the latter, the statutory equitable remedy.

To hold with the defendant and apply § 6860 would be to defeat the provisions of § 6245, wherein it is provided that "any number of persons claiming liens against the same property may join in the same action; and when separate actions are commenced, the court may consolidate them." Under this provision the court treats the property as a fund, and adjudicates once for all, in one action where possible, the claims of all parties thereon, and determines the amount and priority of the various conflicting claims, whether arising by mortgage lien or under the operation of the mechanics' lien laws or otherwise. The entire matter is one belonging peculiarly and exclusively to equitable cognizance, and in which the court cannot, from the very nature of things, be limited only to those instances in which a defendant may be entitled to a judgment against the plaintiff, as provided in § 6860.

Appellants have cited no authorities applicable, and we have found none sustaining their contention. That this is an equitable action, see *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39, at page 47, where the equitable nature of the action is discussed. And it is immaterial that the defendant Leeby has styled his cross bill as a counterclaim. This court has already held in *Erickson v. Russ*, 21 N. D. 208, 32 L.R.A.(N.S.) 1072, 129 N. W. 1025, that reducing a claim to judgment by an action at law does not prevent its enforcement by an equitable action in foreclosure under the provisions of the mechanics' lien laws, to consummate which foreclosure the court of equity is not limited in remedy to the enforcement of its judgment by general execution by the provisions of § 6245, authorizing a deficiency judgment as in cases of foreclosure of mortgages. The claim there made was closely analogous to the one here asserted. The tendency has been to construe broadly, instead of strictly, the provisions of our mechanics' lien law, the provisions of which are remedial, and intrusted to equi-

table jurisdiction exclusively for administration. Pom. Eq. Jur. §§ 137, 138.

But there is yet an additional reason why the contention of the appellants is unsound. This action, permitted under § 6245, wherein mechanics' lien suits may be consolidated and tried as one action, is similar, and in all respects analogous to the statutory action to determine adverse claims, provided by § 7519, and succeeding sections, Rev. Codes 1905, as to general characteristics, including counterclaims and trial and judgment, as prescribed by §§ 7526-7529, and should be governed by the same rules as to pleading and procedure so far as applicable. Prior to the enactment of chap. 5 of the Session Laws of 1901, extending the scope of the statutory action to determine adverse claims to include interests under liens or encumbrances, more need existed than at present for the statutory action provided by § 6245, whereby mere lien actions could thereunder be consolidated. Prior to the 1901 statute, the holdings of the courts were to the effect that without the consent of a plaintiff mere lien interests could not be adjudged or determined under the statutory action to quiet title as then defined by § 5904, Rev. Codes 1899, now as amended § 7519, Rev. Codes 1905. *McHenry v. Kidder County*, 8 N. D. 413, 79 N. W. 875. As showing the then necessity for § 6245, we quote the following from *McHenry v. Kidder County*: "This court has had occasion to hold in an action brought under the provisions of § 5904, that mere liens, as distinguished from adverse estates and interest in lands, cannot, in the absence of consent, be adjudicated. This holding was upon the theory that such an action is peculiar in its nature and must be governed by the letter of the statute which creates this form of action, and distinguished it from all other actions which may be instituted under the Codes of Procedure existing in this state." By chap. 5, Laws of 1901, most of § 7526, governing answer and counterclaim, and all of § 7528, regulating the pleadings, trial, and the judgment in actions to determine adverse claims, first made an appearance, since which time the practice has been to determine, where necessary to full relief, the existence and priority of mechanics' liens in actions brought to determine adverse claims, as well as those brought under § 6245, to enforce mechanics' liens. And we see no reason why the practice and procedure here in question, as to right of equitable counterclaim and

trial thereof, prescribed by §§ 7526-7528, should not be taken as now supplementary, where necessary, to the provisions of § 6245. Hence, defendant Leebby has statutory sanction, as well as that of the usual practice prevailing, for the filing of his answer, which is in effect a cross complaint seeking foreclosure, determination of priorities, and a pro-rating of the fund after foreclosure sale, as affirmative relief against the codefendants, as the action stands entitled, instead of seeking any affirmative relief against the plaintiff. Defendant is properly in court in seeking this relief under the provisions of either § 6245 or §§ 7526-7528, Rev. Codes 1905. And § 6860, declaring primarily and principally the essentials of counterclaims in actions at law, as distinguished from exclusive equitable actions and procedure, can have no application.

The ruling of the trial court on the motion and on the demurrer was proper. The judgment as entered is ordered affirmed, respondent to recover costs on this appeal.

EDWARD E. HEERMAN v. EUGENE S. ROLFE.

(145 N. W. 601.)

In an action to determine adverse claims to real property, both parties deraign title through a common source, to wit, locations made pursuant to certain Dacotah or Sioux Half-breed scrip issued under act of Congress, July 17, 1854. 10 Stat. at L. p. 304, chap. 83. Such scrip was located and filed in the land office by one Thos. B. Ware, pursuant to a power of attorney theretofore executed and delivered to him by the scrippee, one Demerce. Such power of attorney also authorized Ware to sell the land when such scrip was located, and for a designated consideration exonerated him from accounting to the scrippee for the purchase price. Pursuant thereto Ware located such scrip on the land in question on October 18, 1883, making the necessary preliminary proof required by such act. Thereafter, and on said date, he conveyed the land by deed to defendant's remote grantor, Wilbur, under whom defendant claims title. In the month of February, 1884, plaintiff, for a designated consideration of \$50, procured from Demerce and wife personally a deed of such land, under which he asserts title in this action. Plaintiff claims a superior title over defendant chiefly upon the alleged ground that the portion of the power of attorney from Demerce to Ware, authorizing Ware to sell the land, amounted

in effect to an assignment of the scrip in contravention of the act of Congress aforesaid, and was therefore ineffective and void. The land constitutes a part of the town site of Minnewaukan, and a portion was platted by defendant, who has been in possession most of the time since acquiring title, and has paid all the taxes which have been paid on such property.

Scrip — location of — equitable title — patents.

Held, 1. That upon the location of such scrip on October 18, 1883, Demerco acquired the full equitable title to such property, which became absolute upon the subsequent issuance of the patents by the United States government.

Power of attorney — assignment — scrip — act of Congress — alienate — power — contract.

2. That the power of attorney authorizing Ware to sell the land thus acquired through such scrip did not amount to an illegal assignment of the scrip in contravention of the act of Congress aforesaid. Such act merely prohibited the assignment of the scrip as such, and in no manner attempted to restrict the power of the scribee to alienate the land by contract, deed, or otherwise, either prior or subsequent to the location of such scrip.

Notice — constructive — actual — record — equities.

3. Plaintiff at all times had constructive, if not actual, notice of defendant's and his grantor's rights, and, moreover, the record discloses that the general equities in the case largely preponderate in defendant's favor, thus precluding plaintiff's recovery, and clearly entitling defendant to the relief prayed for in his answer.

Opinion filed February 10, 1914.

Appeal from District Court, Benson County, *John F. Cowan, J.*

Action to determine adverse claims to real property. From a judgment in plaintiff's favor, defendant appeals.

Reversed with directions.

Henry G. Middaugh and Rolla F. Hunt, for appellant.

The ten-year statute should bar the plaintiff. Rev. Codes 1905, § 4924; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; *Stiles v. Granger*, 17 N. D. 502, 117 N. W. 777; *Calhoun v. Millard* (*Calhoun v. Delhi & M. R. Co.*) 121 N. Y. 69, 8 L.R.A. 248, 24 N. E. 27; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 352; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Smith v. Clay*, 2 Ambl. 645; *Story, Eq. Jur.* § 1520; *Sample v. Barnes*, 14 How. 70, 14 L. ed. 330; *Walker v. Robbins*, 14 How. 584, 14 L.

ed. 552; *Creath v. Sims*, 5 How. 192, 12 L. ed. 111; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Murray v. Graham*, 6 Paige, 622; *Callaway v. Alexander*, 8 Leigh, 114, 31 Am. Dec. 640; *Powell v. Stewart*, 17 Ala. 719; *Riddle v. Baker*, 13 Cal. 295.

The deed from Demerce to plaintiff is champertous and void. Rev. Codes 1905, § 8733; Rev. Codes 1899, § 7002; *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258; *Brynjolfson v. Dagner*, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320; *Schneller v. Plankinton*, 12 N. D. 561, 98 N. W. 77; *Burke v. Scharf*, 19 N. D. 228, 124 N. W. 79; *Conrad v. Adler*, 13 N. D. 199, 100 N. W. 722; *Hanitch v. Beiseker*, 21 N. D. 290, 130 N. W. 833.

A person who has earned the complete right to a patent for public lands, but to whom the patent has not yet issued, is usually regarded as the equitable owner, the United States or the state holding the legal title in trust for him. 26 Am. & Eng. Enc. Law, 2d ed. 403; *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Deffebach v. Hawke*, 115 U. S. 405, 29 L. ed. 427, 6 Sup. Ct. Rep. 95; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Myers v. Croft*, 13 Wall. 291, 20 L. ed. 562; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Wirth v. Branson*, 98 U. S. 119, 25 L. ed. 86; *Simmons v. Wagner*, 101 U. S. 260, 25 L. ed. 910; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063; *United States v. Freyberg*, 32 Fed. 195; *Witcher v. Conklin*, 84 Cal. 499, 24 Pac. 302; *Hayes v. Carroll*, 74 Minn. 134, 76 N. W. 1017; *Bowne v. Wolcott*, 1 N. D. 415, 48 N. W. 336; *Merrill v. Clark*, 103 Cal. 367, 37 Pac. 238; *McMillen v. Gerstle*, 19 Colo. 98, 34 Pac. 681; *Larison v. Wilbur*, 1 N. D. 284, 47 N. W. 381; *Snow v. Flannery*, 10 Iowa, 318, 77 Am. Dec. 120; *Turner v. Donnelly*, 70 Cal. 597, 12 Pac. 469; *McKean v. Crawford*, 6 Kan. 112; *Cooper v. Hunter*, 8 Colo. App. 101, 44 Pac. 944; *Richards v. Snyder*, 11 Or. 509, 6 Pac. 186; *Dillingham v. Fisher*, 5 Wis. 475; *Morgan v. Curtenius*, 4 McLean, 366, Fed. Cas. No. 9,799; *Camp v. Smith*, 2 Minn. 155, Gil. 131; *Goodlet v. Smithson*, 5 Port. (Ala.) 245, 30 Am. Dec. 561; *Carson v. Railsback*, 3 Wash. Terr. 168, 13 Pac. 618; *Sutphen v. Sutphen*, 30 Kan. 510, 2 Pac. 100; *Union P. R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391; *Olive Land & Development Co. v. Olmstead*, 103 Fed. 575, 20 Mor. Min. Rep. 700; *Allen v. Merrill*, 8 Land Dec. 207.

Heerman cannot complain that the improvements were placed on

the land by Wilbur for Demerce, instead of by Demerce personally. *Fleischer v. Fleischer*, 11 N. D. 221, 91 N. W. 51.

The deeds from Demerce through his attorney in fact, to Wilbur, were effectual and valid. A contract illegal in part, and legal as to the residue, is void as to all, when the *parts* cannot be separated. When they can be, the good will stand and the rest will fall. *Bishop*, Contr. 2d ed. § 487; *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414; *Thompson v. Myrick*, 20 Minn. 205, Gil. 184, affirmed in 99 U. S. 291, 25 L. ed. 324; *Dole v. Wilson*, 20 Minn. 356, Gil. 308; *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584; *Crews v. Burchan*, 1 Black, 352, 17 L. ed. 91; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697; *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; *Midway Co. v. Eaton*, 79 Minn. 442, 82 N. W. 861, affirmed in 183 U. S. 602, 46 L. ed. 347, 22 Sup. Ct. Rep. 261; *Buffalo Land & Exploration Co. v. Strong*, 91 Minn. 84, 97 N. W. 575.

If the transactions were intended as a conveyance of the land, and represented that intention, they could not be shown to be a transfer of the scrip. *Midway Co. v. Eaton*, 183 U. S. 607, 46 L. ed. 349, 22 Sup. Ct. Rep. 263.

T. H. Burke and C. L. Lindstrom, for respondent.

From the power of attorney to Ware, it is clear that all the interest of the Half-breed in the scrip was intended to pass from them to Ware. This was void. Act of July 17, 1854, 10 Stat. at L. 304, chap. 83; *Allen v. Merrill*, 8 Land Dec. 207; *Re Poe*, 29 Land Dec. 309; *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414.

The location of Sioux Half-breed scrip by one acting in his own interest, and not for the benefit of the Half-breed, is in violation of the laws under which the scrip issued. *Allen v. Merrill*, *supra*; *Cyr v. Fogarty*, 13 Land Dec. 673.

The attempted sale in this case, before the final location of the scrip, cannot be sustained. *Bowne v. Wolcott*, 1 N. D. 415, 48 N. W. 336.

FISK, J. This is the statutory action to determine adverse claims to real property described as the east one-half of the southwest one-quarter of section 15, township 153, range 67. The complaint is in the usual form alleging title in plaintiff, and that the defendants claim some estate and interest therein adverse to the plaintiff's title, and prays

that defendants be required to set forth such adverse claims, and that they be adjudged to be null and void and the title quieted in plaintiff; and also that plaintiff have and recover the possession of such real property. Defendant Rolfe, who is the sole appellant, answered separately denying plaintiff's title, and alleging that he, Rolfe, is the owner in fee of the premises, and that for a period of over three years prior to the date of the answer (February, 1903), he had been in possession of a portion of such premises, to wit, fifty lots in the town of Minnewaukan, specifically describing them according to the plat of such town on file and of record; also all that portion of such premises lying in the south part of the town of Minnewaukan. The answer then alleges that he derived such title by virtue of the filing and location in the United States Land Office in the city of Devils Lake, on October 18, 1883, by one John V. Demerce, a Sioux Half-breed, or mixed blood of the Dacotah or Sioux Nation of Indians, of Dacotah or Sioux Half-breed certificate or scrip numbered 386, letter A, for 40 acres; and Dacotah or Sioux Half-breed certificate or scrip numbered 386, letter b, for 40 acres, upon the tracts described in the complaint, and subsequent deeds of conveyance from Demerce and wife to defendant Wilbur, executed and delivered on or about October 18, 1883, and after the location of such scrip as aforesaid, which deeds were, on October 19, 1883, duly filed for record in the proper register of deeds office; that such certificates or scrip were so filed and located on October 18, 1883, upon the premises in controversy, which were at the time unsurveyed government land. That thereafter the government of the United States, pursuant to such scrip filings, conveyed and granted such premises by letters patent to the said Demerce. Then follows allegations showing that such defendant is a remote grantee of the premises and the whole thereof from said Wilbur through various specified mesne conveyances. The answer then alleges on information and belief that plaintiff's alleged claim of title to the premises is based upon a deed claimed to have been executed by Demerce and wife to him on February 26, 1884, and recorded March 4, 1884, and while the said Wilbur was in possession of such premises, and with actual as well as constructive knowledge on plaintiff's part of the prior conveyance by Demerce and wife to Wilbur, and that at the time of such conveyance neither Demerce and wife nor the plaintiff were in possession of the premises or any portion thereof,

nor had they or either of them taken the rents or profits thereof for the space of one year prior to such conveyance, and therefore such alleged deed of conveyance was in violation of § 7002 of the Revised Codes, and was therefore void.

Further answering, defendant alleges that he has for more than three years last past been in the actual, open, notorious, and exclusive possession of said premises to the knowledge of plaintiff, and that plaintiff has never been in the possession thereof, nor prior to the commencement of this action had he ever claimed the same in any manner, nor attempted to assert or acquire possession or control thereof. Defendant also alleges that he and his grantors have paid all the taxes which have ever been paid upon the said premises, and that plaintiff has never paid or offered to pay any portion thereof, nor has he tendered or offered to reimburse defendant for such taxes thus paid by plaintiff. Defendant also alleges that he paid such taxes in good faith and under color of title to the premises in controversy.

The cause was tried in the court below in July, 1904, and judgment was ordered in plaintiff's favor as prayed for in the complaint on December 28, 1911, and judgment entered thereon in January, 1912, from which defendant appeals and demands a trial *de novo* in this court.

Quite a large amount of testimony was introduced at the trial, but there is no very material conflict therein. Both parties claim to have derived title from a common source, namely, through the said Demerce as heretofore stated, and the chief controversy between the parties involves questions of law.

Before considering the legal points raised, we deem it advisable to make a brief statement of the facts as disclosed by the evidence.

John V. Demerce was a Sioux Half-breed, and the government had issued to him the scrip aforesaid in exchange for lands of the Sioux Half-breed Reserve at Lake Peppin, Minnesota, under act of Congress of July 17, 1854, 10 Stat. at L. page 304, chap. 83, and he and his wife duly executed and delivered to one Thomas B. Ware two certain powers of attorney empowering him "to enter into and upon and take possession of any and all pieces and parcels of land, or the timber or other materials thereon, in the territory of Dakota, which we now own or which we may hereafter acquire or become seised of, or in

which we may now or hereafter be in any way interested" by virtue of such scrip, which was therein described, and further empowering him "to grant, bargain, demise, lease, convey, and confirm said land or any part thereof to such person or persons, and for such prices as to our said attorney shall seem meet and proper, and to thereupon execute and deliver in our name and on our behalf any deeds, leases, contracts, or other instruments, sealed or unsealed, and with or without covenants of warranty, as to him shall seem meet to carry out the foregoing powers." Such powers of attorney also contain provisions reciting that, in consideration of \$40, such powers of attorney were made irrevocable, and that said Demerce and wife released all claims for proceeds of sale. Such powers of attorney were executed and duly acknowledged on July 10, 1883, and duly recorded on October 19, 1883, in the proper register of deeds office.

Acting under these powers of attorney, Thomas B. Ware entered upon certain unsurveyed land in Benson county, where the town of Minnewaukan was to be laid out, and made improvements pursuant to the statute under which the scrip was issued, and located such scrip on October 18, 1883, filing the same in the proper land office, together with his letters of attorney and applications to locate the scrip on the lands in controversy, such lands being then and there described by metes and bounds and by diagram. Such applications were accompanied by the affidavits of Ware showing that the tracts had been entered upon under such scrip, and stating the kind, character, and nature of the improvements that had been made on the land so located, whereupon the register and receiver of the land office indorsed on such applications their certificates, showing that the two items of scrip aforesaid had that day been located on the tract of land pursuant to the provisions of such act of Congress, and by the party duly authorized to make such location. They also certified to the receipt of such scrip from the said Ware. After the land in controversy had been surveyed, and on February 28, 1884, Ware filed in the land office confirmations whereby the lands so entered and scripted were adjusted to the government survey, and were shown to embrace the land described in the complaint. Subsequently, the government issued patents granting such land to John V. Demerce. After the location of such scrip as aforesaid, and on October 18, 1883, Demerce and wife, by the said Thomas B

Ware, their attorney in fact, under such powers of attorney, for a designated consideration of \$200, granted and conveyed the premises to D. L. Wilbur by two separate warranty deeds containing the usual covenants, which deeds were duly recorded in the proper register of deeds office on October 19, 1883. The execution of such deeds is admitted. Thereafter Wilbur platted the principal part of said land as a portion of the town site of Minnewaukan, a small portion thereof lying at the south end being unplatted. The certificates to such plat bear date October 24, 1883, and such certificates and plats were filed for record on October 30, 1883.

Defendant Rolfe concededly holds such title as he may have through Wilbur.

The evidence discloses that thereafter, and on February 26, 1884, John V. Demerce and wife, for a named consideration of \$50, executed a deed of the whole of the premises in controversy to the plaintiff, and it is through this deed of conveyance that the plaintiff asserts title in this action. The proof discloses that plaintiff never paid any taxes on the land.

He was asked this question:

Q. Did you ever pay any taxes on this property?

A. No, sir, never had an opportunity; I claimed I owned it as an eighty, and they had no right to assess it as lots.

Q. You didn't offer to pay the taxes on the lots?

A. No, sir.

It was admitted at the trial that defendant Rolfe had paid all the taxes upon the unplatted part of the land in controversy from 1887 to 1902 inclusive, and it was stipulated by plaintiff's counsel "that defendant Rolfe has had this land, the unplatted portion of the south forty of this tract in question, under fence for four years, and as soon as that fact was ascertained by the plaintiff that he instituted the proceedings now pending." It was also admitted that defendant Rolfe had a well upon these premises and it was used daily in the watering of stock and had been for four years.

There is some testimony in the record tending to show that plaintiff, through his agent Campbell, placed a small shack on the premises in

the spring of 1884, and Campbell and his wife resided therein until the fall of 1886 or 1887, and the witness Campbell testifies that during that time he knew of no other buildings or improvements on the premises. This, at the most, is the extent of plaintiff's possession. However, it is a conceded fact in the case that Rolfe paid all the taxes upon the unplatted part of the land in controversy from 1887 to 1902 inclusive, and at the commencement of the action and for several years prior thereto he was in possession and had made valuable improvements, including the digging a well and the construction of fences.

Considerable testimony was introduced relative to the extent of the improvements placed upon the premises prior to the filing of the scrip, but the fact that the land office department accepted the proof offered before them as a sufficient compliance with the statute, and thereafter issued the patents to Demerce, renders such testimony not material. In other words, the government alone can question the sufficiency of such preliminary proof by the entryman. Furthermore, both parties to this litigation base their claim to title under the patents aforesaid, the defendant through a deed executed by Ware as attorney in fact for Demerce pursuant to the powers of attorney aforesaid, and the plaintiff through a deed subsequently executed by Demerce personally. It is for the court, therefore, to decide, under all the facts and the law applicable thereto, which deed should prevail, keeping in view the provision of the Federal statute under which such scrip was issued, prohibiting the assignment thereof,—it being respondent's contention that the so-called powers of attorney were null and void in so far as they authorized such attorney in fact to sell the land.

In the light of the foregoing statement of facts, we will now consider the propositions of law advanced.

It is first contended by appellant's counsel, and we think with much merit, that, in view of the fact that seven years and five months elapsed between the trial of the case and the decision thereof by the trial court, and especially in view of the fact that such court made no finding of fact except the ultimate fact of plaintiff's ownership of the premises, the general rule that where the testimony is conflicting this court should give weight to the findings of the trial court, because of his superior opportunities for weighing the testimony and determining the credibility of the witnesses, should not obtain on this appeal. What

the rule should be under such a state of facts we do not determine, for there is no sharp conflict in the testimony as to the controlling facts.

Appellant's second point is that plaintiff was guilty of gross laches in asserting his alleged rights, and that therefore he ought not to recover. And his next point is that the deed from Demerce to plaintiff was champertous and void under § 8733, Rev. Codes 1905, and numerous decisions of this court cited in the brief. The conclusion which we have reached upon other points makes it unnecessary for us to consider either of the above contentions.

Appellant's contention under points 4, 5, and 6 are, we think, correct, and this conclusion necessitates a reversal of the judgment. These contentions in the order presented are,

First. That upon the location and surrender of the scrip on October 18, 1883, Demerce acquired an equitable title to the land in controversy, and that the patents, when issued by the government, related back to that date.

Second. The powers of attorney from Demerce to Ware, appellant's remote grantor, were valid, effectual, and sufficient to authorize the attorney in fact, Ware, to locate and surrender the scrip, and make the filing thereunder in the United States Land Office, and to convey the land acquired thereby; even though the separate and additional power therein purported to make it irrevocable, and released the attorney from any claim to the funds realized on a sale, may have been ineffectual and inoperative; and,

Third. The deeds from Demerce through Ware, his attorney in fact, to Wilbur, were effectual and valid.

Regarding the first proposition, it is respondent's contention that while the powers of attorney were valid and effectual to authorize Ware to locate the scrip for Demerce, that the portion of such powers of attorney authorizing him to sell the land to be thereafter acquired through such scrip, and providing that the same should be irrevocable, amounted to an assignment of the scrip contrary to the act of Congress under which the same was issued as aforesaid. He also contends, as we understand it, that the location of this scrip having been made by metes and bounds, and not accompanied by a diagram denoting natural objects and distances so as to fix with certainty the exact location wanted, that Demerce acquired no interest in the land until February

28, 1884, when a new application to locate the same scrip upon the same land was made, describing such land by the proper government subdivisions according to the survey which had been made after the first location. His chief contention, however, is in brief that the powers of attorney authorizing Ware to take such steps as were necessary to vest title in Demerco were valid, but the portions purporting to authorize him to convey the land were null and void, for reasons above stated. Such contention, as we shall hereafter see, lacks support in the authorities, and is untenable. It seems to be well settled that after a location of such scrip is made in conformity with the act of Congress, the holder acquires a vested right, and he possesses in equity the equitable title to the land, the government holding the legal title in trust for him. It is also well settled that, notwithstanding such scrip is not assignable (*Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862), the land scripted is alienable as soon as located, and the holder of the scrip may give a valid power of attorney, not only for the location of the land, for the erection of improvements thereon, but for its conveyance after location. See 22 Cyc. 139 and cases cited, and especially *Buffalo Land & Exploration Co. v. Strong*, 91 Minn. 84, 97 N. W. 575; *Midway Co. v. Eaton*, 183 U. S. 602, 46 L. ed. 347, 22 Sup. Ct. Rep. 261, affirming 79 Minn. 442, 82 N. W. 861; *Dole v. Wilson*, 20 Minn. 356, Gil. 308; *Thompson v. Myrick*, 20 Minn. 205, Gil. 184; *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414.

The Minnesota supreme court in *Buffalo Land & Exploration Co. v. Strong* had before it for consideration scrip issued under this same act of Congress, and a power of attorney in all respects like that in the case at bar, and we think the opinion in that case conclusively answers respondent's contention that the powers of attorney, being irrevocable, operated as an assignment of the scrip. This point being respondent's main contention, we feel justified in quoting liberally from the opinion of the Minnesota court. Among other things, that court said:

"There was no substantial difference between the power to locate the scrip considered in *Midway Co. v. Eaton*, *supra*, and the one now before us. The attorney in fact, or his substitute, was irrevocably vested in terms with all such power and authority as Pettijohn himself could exercise if personally present; and the acts of such attorney, or his duly authorized substitute, were fully ratified and confirmed.

Nothing more need be said about this power. The only difference between the power to sell under consideration in this case last mentioned, and the one now before us, arises out of the clause in the latter whereby, and in consideration of the sum of \$160 paid by the attorney in fact named in the power, there was irrevocably vested in such attorney the power to grant, bargain, sell, demise, convey, and confirm any tract of land which Pettijohn might acquire by virtue of the scrip location; and the latter, for this same consideration, also released to his attorney all claim to any of the proceeds of a sale, lease, or contract relative to any part of said land. It is well settled, with certain exceptions, that a principal named in a power of attorney may revoke such an instrument at his mere pleasure, although the agency may be expressly declared to be irrevocable in terms. This rule of law applies to the power to locate, which expressly provided that it was irrevocable. But when the authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, the power is irrevocable whether so expressed or not.

"The power to sell was therefore irrevocable, because it was executed for a valuable consideration. But we do not regard this fact as distinguishing this case from one where the power to sell may be revoked at will, whether there is or is not a provision declaring it irrevocable. But the fact that the power to sell was irrevocable did not operate to, nor did it, transfer the scrip, or have any more effect upon the transaction than if the power had been simple, and in terms exactly that considered in the Midway Case. The inhibition found in the statute applies solely to a transfer or sale of the scrip, and in this case the scrip was to be located by the attorney in fact in the name of Pettijohn, and the patent would issue to Pettijohn, and to no one else. When the location was made under the power, the land became Pettijohn's, and could have been conveyed by him at any time before an exercise of the authority found in the power to sell.

"The case is governed in part by *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414, and is not distinguishable from *Thompson v. Myrick*, 20 Minn. 205, Gil. 184. In the first of these cases it was held that the right to acquire lands by means of this scrip was a personal right in the one to whom the scrip was issued, and was not property, in the sense of the right being assignable; that no restraint was imposed by

the statute upon the right of property in land acquired by a location of the scrip after such location. In the scrip itself, said the court, the Half-breed had nothing which he could transfer to another, but his title to the land, when perfected under it, was as complete as though acquired in any other way. The title vested absolutely. In the Thompson Case it appears that, with a view to the location of the scrip for the benefit of the beneficiaries, one Myrick placed the same, with powers of attorney, in the hands of Thompson, and at the same time entered into a written agreement with Thompson, in which he agreed that, upon the location of the scrip, he would secure the title to the land located to be lawfully vested in Thompson. The consideration was \$2,800, evidenced by a note payable in one year from its date, and to be secured upon the land as Thompson should acquire title. Thompson located the scrip, and demanded a conveyance of the title. Myrick refused, and conveyed the land to his wife, who was also a defendant in the suit. Specific performance was decreed by the trial court, and its decree was affirmed by the supreme court of the state and of the United States.

"If such a contract did not operate as a transfer of the scrip, we fail to see how the power of attorney now before us could have that effect. If anything, the intent to secure title to the land was much more manifest through the Myrick-Thompson contract than it was by an irrevocable power of attorney executed for a valuable consideration. It could make no possible difference whether \$160 was actually paid before the location in consideration of the execution of a power, or \$2,800 was to be paid afterwards, for the title.

"The fact that the two powers may have been given at the same time, and with an intent that through one the real estate located by virtue of the other should be conveyed to a third party, does not amount to an assignment of the scrip itself,—the only act forbidden. The powers are entirely separate and independent. The exercise of one does not depend upon the exercise of the other. Hoover is made the agent to locate; Hale, to sell. The power to locate was revocable; the power to sell was irrevocable. If the transactions were intended as a conveyance of the land, and represented that intention, they could not be shown to be a transfer of the scrip. *Midway Co. v. Eaton*, supra."

The Supreme Court of the United States in the case of *Midway Co. v. Eaton*, 183 U. S. 602, 46 L. ed. 347, 22 Sup. Ct. Rep. 261, affirming

79 Minn. 442, 82 N. W. 861, set at rest the principal questions involved in the case at bar favorable to appellant's contention. That was an action to quiet title. Two pieces of Sioux Half-breed scrip were issued to one Orillie Moreau. She executed powers of attorney to locate such scrip and to sell the land. Pursuant thereto, such scrip was located on unsurveyed land, describing it by metes and bounds. Subsequently, there was an adjustment to the government survey. The rights and interests of Orillie Moreau Stram, by sundry mesne conveyances, were conveyed to the defendants, Eaton et al. After the locations of the scrip and the transfer, an attack was made in the United States Land Department against the scrip locations, and the Secretary of the Interior held such locations invalid, and that neither Orillie Moreau Stram, nor those claiming under her, were entitled to the land, for the following reasons: "(1) That the improvements made upon the land when it was unsurveyed were not made under the personal supervision of Orillie Stram, and that she had not had personal contact with the land; (2) that the power of attorney to Eaton to locate the scrip, and the power of attorney executed at the same time to Leonidas Merritt to sell the lands which should be located, operated as an assignment of the scrip, and were in violation of the act of July 17, 1854, and the entry of the lands therefore was not for the benefit of said Orillie Stram; (3) that the subsequent location and adjustment of the scrip to the lands after the latter were surveyed were ineffectual in view of the previous attempt to locate the scrip, and in view of his (the Secretary's) decision relative to the question of improvements; (4) that Orillie Stram had no power to alienate the lands before location of the scrip, or to contract for the sale of them, or to grant a power of attorney to sell the same for her after they should be located, but held that she had the right to sell immediately after location of the scrip. As a deduction from these conclusions, the Secretary held that the lands were still public lands, and open to entry."

After the land was attempted to be thus thrown open for settlement, a filing was made by one Frank Hicks, to whom patent was subsequently issued, and Hicks and his wife conveyed to the plaintiff. The defendants, Eaton et al., claim under the Half-breed scrip locations and sundry mesne conveyances. The Supreme Court in its opinion reviewed and quoted at length from *Gilbert v. Thompson*, 14 Minn. 544,

Gil. 414, and *Thompson v. Myrick*, 20 Minn. 205, Gil. 184, 99 U. S. 291, 25 L. ed. 324, and from the decisions of the Secretary of the Interior, and sustained the scrip locations and the transfers to the defendant.

We quote from the opinion as follows: "If evidence was excluded in *Gilbert v. Thompson*, it was admitted and considered in *Thompson v. Myrick*; and in both cases the delivery of scrip and its location under letters of attorney were decided to be valid, forming in one case a good title, and in the other constituting a ground for a compulsory conveyance from the Half-breed. The moral and legal effect of the transfer of scrip was declared by the court in *Gilbert v. Thompson*. The first involved, the court said, no 'turpitude nor the breach of any legal duty, as in the case of an attempt to transfer a pre-emption right;' of the second, it was said, it would be of no effect as a transfer; that 'the title to the scrip would remain in him (the Half-breed), and the title to the land covered by it would vest in him (the Half-breed), just as though no such attempt had been made.' The power of attorney, however, was given full legal effect as authority to sell the land located. It is true the court excluded parol evidence of an intention to transfer the scrip. But why? Manifestly, because the transactions did not constitute a transfer of the scrip as such, and their legal character could not be destroyed by parol proof that they were intended to be something else. In other words, the court decided that the transactions were intended as a conveyance of the land, and represented that intention, and could not be shown to be a transfer of the scrip. And in *Thompson v. Myrick* the court observed: 'We can conceive of no reason why *Myrick* was not at liberty, either before or after location was made, to enter into an agreement to secure the title (inuring from the location) to the plaintiff upon the payment of an agreed consideration.' The reasoning and the conclusions of the supreme court of Minnesota were approved by this court, as we have seen."

In the light of these controlling authorities, our duty seems plain, and we deem an extended discussion of the questions involved quite unnecessary.

Respondent's counsel were evidently led astray by certain decisions and rulings of the Department of the Interior, especially with reference to the construction of that portion of the act under which this scrip was

issued and located, wherein it provides: "That no transfer or conveyance of any of said certificates or scrip shall be valid." While certain decisions of the Land Department have broadly held that such act was violated under facts similar to those in the case at bar, the courts in the cases above cited have uniformly held to the contrary, construing such provision as merely intended to prohibit an assignment of the scrip, and in no manner intended to restrict the scribee in alienating the land when acquired, or in the least interfering with any contract he may enter into for a future sale or conveyance thereof.

We think respondent's counsel are also clearly in error in the contention that Demerce acquired no title which he could convey until February 28, 1884, the date when he made the application to adjust the scrip locations to the government subdivisions. The validity of the locations made on October 18, 1883, was not questioned by the government in any respect. On the contrary, the Land Department on that date accepted the scrip as properly located, and issued receipts therefor. The date of such original locations must therefore be deemed the date when Demerce's equitable title vested. See *Allen v. Merrill*, 8 Land Dec. 207; *Harmon v. Clayton*, 51 Iowa, 36, 50 N. W. 541.

Respondent at all times had at least constructive notice of appellant's rights. Not only this, but the general equities of the case largely preponderate in appellant's favor, and as we have seen, the contentions of respondent lack support in the authorities.

It follows that the judgment should be and the same is accordingly reversed, and the District Court directed to enter a judgment in defendant's favor, quieting title as against the plaintiff to the lands in controversy, as prayed for in the answer, appellant to recover his costs and disbursements in both courts.

LOUIS DEMARS v. MRS. ALBERT GARDNER.

(145 N. W. 129.)

Justice court — action — change of venue — notice of trial — may be served on parties or attorneys.

When a change of venue is taken from one justice to another upon affidavit

of prejudice, the notice of the time and place of trial given by the second justice may be served upon either the parties or their attorneys.

Opinion filed January 20, 1914. Rehearing denied February 11, 1914.

Appeal from the District Court of Ward County, *Leighton, J.*
Affirmed.

Geo. H. Gjertsen, for appellant.

Section 8506 of the Revised Codes of 1905 makes it obligatory to serve an answer only when the judgment from which appeal is taken was by default. In this case there was no default. 13 Cyc. 759.

When a change of venue is had in justice court, it is the duty of the justice to whose court the case is taken, to notify both parties of the time and place of trial. Such notice must be served on the party. *Richmire v. Andrews & G. Elevator Co.* 11 N. D. 454, 92 N. W. 819; *Weimer v. Sutherland*, 74 Cal. 341, 15 Pac. 849.

A. W. Gray and *L. F. Clausen*, for respondent.

Upon change of venue in justice court, the justice before whose court the case is taken has the same jurisdiction as though the case had originated in his court. Rev. Codes 1905, § 8377.

Informalities in the service of a required notice do not invalidate the notice, so long as the necessary information is given to the proper party. 29 Cyc. 1116; *Bates v. A. E. Johnson Co.* 79 Minn. 354, 82 N. W. 649.

A justice's judgment may be informal, but, if it causes no prejudice and does not affect substantial rights of the defendant, it is not void. 23 Cyc. 921.

Where an attorney appears in an action for defendant, in an action where defendant has been duly served with process, the presumption is that such appearance is by authority. If no authority has been given, it is the duty of the defendant to promptly disavow the act of the attorney. The judgment here entered was a default judgment. 4 Cyc. 926; 13 Cyc. 759; 23 Cyc. 734.

Some pleading should have been served with the notice of appeal. *Aneta Mercantile Co. v. Groseth*, 20 N. D. 137, 127 N. W. 718.

BURKE, J. This action was begun before a justice of the peace by the issuance and service of a summons and complaint in replevin. Two days before the return day of the summons, the defendant filed an affidavit of prejudice and asked for a change of venue. The motion for a change of venue was signed by George H. Gjertsen, as her attorney. Upon the return day of the summons, plaintiff appeared with his attorney, but the defendant was not represented either personally or by attorney, and the said justice of the peace transferred the case to the nearest justice in said county. This second justice thereupon docketed the case and set the time for hearing five days later at 10 o'clock A. M. of said day, and he thereupon mailed notice of such hearing by registered mail to the said attorney for the defendant.

Upon the said return day the defendants made no appearance and judgment was duly entered against them by default. Later defendant appealed to the district court upon the following assignment of error: "The above-named justice of the peace erred in entering judgment in this action, on the ground and for the reason that no notice was served upon the defendant as to the time and place the trial of said cause would take place, * * * and that thereby said justice lost jurisdiction to try said action." The same attorney represented the defendant in this appeal, and later he moved the district court to dismiss the justice's judgment upon the same ground.

When the case was reached in the district court, defendant being represented by the same attorney, the ruling of the district court was that the service of the said notice was ample and sufficient, and that the second justice of the peace had jurisdiction of the case, and that his judgment was legal, and the motion of the defendant was thereupon denied and the appeal dismissed. From this order of the district court this appeal has been taken and is now before us for consideration.

(1) While appellant has specified six errors, they all are founded upon the same proposition, namely, that the second justice had served the notices upon the attorney, and not upon the defendant personally, and we will consider them all together. Plaintiff has made the contention that the appeal of the defendant from the justice court was ineffectual, because of a lack of an answer or demurrer at the time of the said appeal, but we find it unnecessary to consider this question. Subdivision 2, § 8377, Rev. Codes 1905, provides that, upon a change

of venue and "upon the receipt by him of such papers, the justice of the peace to which the case is transferred must issue a notice stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial, unless such notice is waived by consent of the parties entered on the docket." It is conceded in this case that the notice was served by registered mail upon an attorney, and not personally upon the defendant. The sufficiency of this service is the vital question in this case. Appellant contends as follows: "The only evidence of service of such notice is the entering in the docket of the justice of the mailing thereof by registered mail to George H. Gjertsen. The record of the justice's docket on appeal does not show that defendant appeared by attorney, and as a matter of fact George H. Gjertsen at no time appeared for the defendant in the justice court. The affidavit for change of venue was tendered for filing in behalf of defendant by her husband; so, as a matter of fact, no service whatever of any kind was ever made upon the defendant or her attorney." It will be noticed that it is not denied that the attorney received the notice in ample time to protect his client's interests. Neither is it denied that the motion for change of venue was signed by said Gjertsen as attorney for defendant, but it is stated that such motion was filed by defendant's husband, and that said Gjertsen was not physically present in the justice's office at any time. We do not consider it material that the attorney did not appear in the justice court and tender his motion to the justice. The fact that the motion was signed by him as an attorney gave the justice ample authority to treat him as defendant's attorney, and he is certainly estopped to deny that relationship at this time. So that it must be conceded that the said notice was duly and regularly served upon defendant's attorney.

However, the statute says that the notice must be served upon the parties, and it is stoutly contended that this requires personal service upon the defendant, and that service upon her attorney will not suffice. In support of this contention we are cited to *Richmire v. Andrews & G. Elevator Co.* 11 N. D. 453, 92 N. W. 819, wherein it is held that the notice in such cases need not necessarily be served upon the attorney. Section 8348, Rev. Codes 1905, provides that "the provisions of the Code of Civil Procedure shall govern the proceedings in justices' courts as far as applicable, when the mode of procedure is not prescribed by

this Code . . .” Section 7339, Rev. Codes 1905, provides that “when a party shall have an attorney in the action, the service of papers shall be made on the attorney instead of the party. . . .” And § 7340 provides that “the provisions of this chapter shall not apply to the service of a summons or other process or of any paper to bring a party into contempt.” It is therefore material to consider whether or not the notice in this case amounts to the dignity of process, so that it, like a summons, must be served upon the parties, and also whether or not the Justice Code, by prescribing that the service must be upon the parties, has excluded service of this particular notice upon the attorney. Upon the first proposition we think there is little doubt. After the defendant had been served with summons and brought into court, the justice had acquired jurisdiction, and upon the transmission of the case to the second justice, the second justice acquired jurisdiction of the defendant. Therefore notice of the time of the trial was not a jurisdictional paper, and we think might be served upon the attorney under the proceedings in district court, if they govern herein.

Whether the Justice Code’s provision that this notice must be served upon the parties excludes service upon the attorneys is another and more complicated question. In *Richmire v. Andrews & G. Elevator Co.* supra, this court says that it is only when the Justice Code is silent upon the proposition that the procedure of the district court applied. However, this exact point was not before the court at that time. They were confronted with the question of the validity of a service made upon the defendant personally, and they held such service valid. Whether they would have held invalid a similar service upon the attorney is another question. Upon the question of service at 32 Cyc. 461, it is said: “Service upon the agent or attorney of defendant, and service by mail, are also regarded as substituted service, although they are usually authorized under more restricted conditions. Such service is usually considered the equivalent of personal service and gives the court jurisdiction over the person of defendant.” In *Johnston v. Robins*, 3 Johns. 440, it was held that the service of a notice by leaving at the dwelling house of the party was to be considered a personal service for every proposition except to bring the party into contempt. This under statute requiring that the notice therein considered should be personal service. In *Atchison County v. Challiss*, 65 Kan. 179, 69 Pac. 173, the supreme

court of that state was called upon to construe the following statutes relating to service of notice of the pendency of an action, and reads as follows: "Thereupon a summons shall be issued as in other cases and served upon the defendants personally, if residents of the state." And the court says: "We are of the opinion the provision for personal service upon resident defendants contained in the act is in legal effect the same as though it provided 'thereupon a summons shall be issued and served as in other cases upon the defendants, if residents of the state.' It follows that the service made by the sheriff in leaving a copy of the summons at the usual place of residence of the defendants Challiss fulfilled the spirit and intent of the act, and was sufficient personal service to meet the requirements of the law." To the same effect is *Abbott v. Abbott*, 101 Me. 343, 64 Atl. 615. Those cases are upon different facts than the case at bar, but we think the facts were all the more in appellant's favor than in the case at bar. If "personal service" can be effected by leaving a copy of the summons at defendant's residence, it could be more strongly urged that the serving of an intermediate order upon defendant's attorney met the requirements of our Code that the same was served upon the parties. We have not located any case upon parallel facts with ours, and counsel has not cited any to us. We are of the opinion that the service upon the defendant was in substantial compliance with the law, and that the judgment entered by the second justice was valid. As defendant was in default in the justice court, and as the appeal to the district court was upon questions of law alone, and no pleading was served with the appeal, it must be conceded that the defendant did not ask nor desire a retrial in the district court and had elected to stand upon this one point. Being mistaken on this point, the order of the District Court was correct, and is accordingly affirmed.

E. A. PRICE v. J. E. BURKE.

(145 N. W. 405.)

Evidence — recovery — mechanics' lien — foreclosure — contract — owner — authorized agent — knowledge — ratification.

Evidence examined, and held insufficient to establish a right to recover, it
27 N. D.—5.

not appearing that the purported improvement for which the mechanics' lien was claimed and is sought to be foreclosed, a well, was dug under an express contract with the owner or his authorized agent; nor is it established that defendant, before the completion of the work, had knowledge that the same was being done, or that he has subsequently ratified the same.

Opinion filed January 20, 1914. Rehearing denied February 11, 1914.

From a judgment of the District Court of Ward County, *Leighton*, J., dismissing this action, plaintiff appeals.

Affirmed.

F. B. Lambert, for appellant.

The right to a mechanics' lien is not necessarily based on an express contract. It may arise and exist under an *implied* contract. Rev. Codes 1905, § 5339.

The question of *consent* is clearly interwoven with *knowledge*. Rock-el, *Mechanics' Liens*, § 35, p. 89, notes 12, 13; *Abbot v. Third School Dist*, 7 Me. 118; *Hayden v. Madison*, 7 Me. 76; *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Lamb v. Bunce*, 4 Maule & S. 275, 16 Revised Rep. 470; *Connor v. Hackley*, 2 Met. 613; *Preston v. American Linen Co.* 119 Mass. 400.

Where a party knowingly and without objection permits another to render service for him, the law implies a promise to pay. *Garrey v. Stadler*, 67 Wis. 512, 58 Am. Rep. 877, 30 N. W. 789; *Bloom, Mechanics' Liens*, § 475, p. 434, note 15; 27 Cyc. 73, cases in note 16; *Phillips v. Clark*, 4 Met. (Ky.), 348, 83 Am. Dec. 491; *Barclay v. Wainwright*, 86 Pa. 191; *Stepina v. Conklin Lumber Co.* 134 Ill. App. 173; *Cannon v. Felfrick*, 99 Ind. 164; *Phelps v. Maxwell's Creek Gold Min. Co.* 49 Cal. 336.

The burden of proof is upon the lien claimant to show knowledge of the owner. Such burden has been amply met. *Dodge v. Romain*, — N. J. —, 18 Atl. 114.

Palda, Aaker, & Green and *I. M. Oseth*, for respondent.

Findings of the trial court upon an issue of title by adverse possession may not be disturbed on appeal, when not clearly against the evidence. *Chadderdon v. Maxwell*, 175 Mich. 709, 141 N. W. 596; *Eyre v. Faribault*, 121 Minn. 233, — L.R.A.(N.S.) —, 141 N. W. 170; *Independent Pub. Co. v. Stanley County*, — S. D. —, 141 N. W. 366; *Kroeger v. Warren*, — S. D. —, 141 N. W. 395.

Equitable issues may be reviewed or tried anew in the appellate court, but issues of law will *not* be reviewed or retried. *Laffy v. Gordon*, 15 N. D. 282, 107 N. W. 969.

The supreme court will not determine the credibility of the witnesses or the weight of their testimony. *Mitchell v. Des Moines City R. Co.* — Iowa, —, 141 N. W. 43; *Moriarty v. Maloney*, 121 Minn. 285, 141 N. W. 186; *Wolf v. Ranck*, — Iowa, —, 141 N. W. 442; *State ex rel. Rice v. Chicago, M. & P. S. R. Co.* — S. D. —, 141 N. W. 473; *Taute v. J. I. Case Threshing Mach. Co.* — N. D. —, 141 N. W. 134.

Goss, J. The decision of this case involves little more than a review of fact only. It is an equitable action brought to establish a right to recovery for alleged improvements to realty by foreclosure of a mechanics' lien. The improvement was a deep well alleged as drilled under contract between the well digger, Price, and Burke, the owner of the land.

Some facts are uncontroverted, but as to the greater portion a square conflict exists in the evidence. The well was drilled by the plaintiff to a depth of 401 feet, for which he has filed his lien for \$601.50, or at the alleged agreed rate of \$1.50 a foot. The well drilling was done after an interview plaintiff had with defendant in Velva, on June 3, 1907. What was there said is in direct conflict, plaintiff claiming that Burke then gave him authority to see Myatt, Burke's tenant on the land, and that whatever Myatt authorized done would be all right, and that he had to have a well. Plaintiff testifies he then told Burke that his price was \$1.50 a foot, everything furnished, and that Burke told him he wanted everything furnished as he was to be away at Willeston or Montana for a considerable time, and could not look after it himself, and in effect authorized Price to deal with the tenant Myatt. All parties agree that a conversation occurred between Price and Burke at said place and date, that Sunday afternoon, as they were coming from a ball game. Burke denies plaintiff's statement of the conversation, and testifies that he was accosted by plaintiff, who told him his business, and "said that he understood I had trouble getting water enough at my farm, and I told him I had. He said he was a well driller and wanted to know if he could make a well for me, and I told him no, I had already made arrangements to fix the well I had on the place." That he

had no further conversation whatever with Price; that he did not refer Price to Myatt; that "I did not speak to him more than two seconds; I told him that I had already told Myatt what to do with the well, fix up the old well." That nothing was said in regard to the price of digging wells nor about a pump for the well. Burke testifies that the only authority in the matter he had given to Myatt was to dig down deeper a well already upon the place; that such well already there had been in use for five years and had always before furnished plenty of water for farm use; that he had never authorized the drilling of a well or anything more than the mere digging out of the old one; that this moment's talk was the only conversation he says he had with Price until after the completion of the well. Concerning the Velva incident, Burke is corroborated by Joe Strong, who, when asked to state what he recollected of the conversation, says: "Well, there was not much conversation; Price asked him in regard to digging a well, and Burke said he had made arrangements with Myatt out there to dig down the well. It only lasted about a minute or half a minute. That was all that was said. There was nothing talked about the price of drilling a well or anything of that kind. They did not talk together after that. Burke walked down town (from the place where the talk occurred) with me and Flatner; we all walked down together." On cross-examination he testified: "Burke said he had made arrangements with Myatt to look after the well;" which statement was explained on redirect examination to mean the well he was going to have "dug down or dug out." Price had been looking for work and had previously asked Myatt for the job of drilling a well, and Myatt had referred him to Burke.

Price says he started in at drilling the well after he had procured from Myatt consent to do the work, he informing Myatt of the price he would charge. The work was begun on the 19th, 20th, or 21st of June, according to plaintiff's testimony, he being uncertain as to the exact date, and he testifies the well was completed some time from the 11th to the 16th of July, being uncertain as to that date also, which date is very material, as will hereafter appear. The bill attached to the verified lien claim recites the commencement of the work on June 19th, and its completion July 11, 1907, and that the same was done under a contract made by plaintiff with the defendant on June 17th, or as would appear, two days before the work was commenced. The date of the veri-

fication of this lien, filed September 3, 1907, is August 29, 1907. This was after the presentation to Burke of a bill for the work, which bill is dated July 23d, and is in evidence as Exhibit A, and is stamped received by Burke July 26, 1907, and answered by him July 27, 1907. It thus appears that the mechanics' lien was prepared within a day after the receipt of the answer to the presentation of the claim, evidently adverse to payment, or the lien would not have been filed forthwith.

Burke appeared at his farm again July 12th, or nearly six weeks after the talk had with Price in Velva, Burke making the trip to his farm with an automobile from Sawyer, and then discovered, as he says for the first time, the well in question, and that the same was already completed. That Price was away; that one Newman was there with the well-drilling outfit; that he started to talk with Newman; that he was sore about them being there, and Newman told him he had nothing to do with it or with the outfit; that it used to belong to him, but Price had the job; that he asked him where Price was and was told he had gone to Sawyer; that he then found Myatt and wanted to know what they were doing and what authority Myatt had for doing that, and he was then told by Myatt that Price had informed Myatt that he, Price, had seen Burke in Velva and had made arrangements with him, Burke, and that he, Myatt, considered he had nothing to do with it, and was sore because Burke blamed him for it. At that time they had pumped the well and had made ditches to drain off the water, and the water so pumped had splashed all over. Burke was positive that this was on the 12th day of July, fixing the date from memoranda and his whereabouts and other events; that he was then told by Newman in charge of the outfit, "they were down 401 feet and the water supply was sufficient," and that they had pumped it four days in testing it. Myatt did not testify, the inference from the testimony being that he had left the country. Burke traced his own whereabouts from the 3d day of June until the 12th of July. It appears that he was in Bismarck June 4th and obtained a pardon for one Alice Hale, leaving Bismarck for Detroit, Minnesota, where he attended a wedding June 5th, leaving there for Fargo and Minneapolis, returning to Minot June 9th, then going to Towner, and on June 12th to Berthold, on the 13th to Williston, and on the 14th to Poplar, Montana, returning to Minot June 18th, and going back to Williston on the 19th, then engaging from June 20th un-

til July 6th in the trial of the Heddrick will case, in which trial he was one of counsel engaged. Witness then returned from Williston, went to Towner, Minot, and Velva, and from there to the farm. Witness testifies from memoranda consisting of sleeping car checks and checks drawn by him, to fix dates, refreshing his recollection, and from which witness is able to fix positively the date of his only visit to the farm as of the 12th of July, 1907. The importance of fixing the date of this visit with reference to the time of completion of this well is the question decisive of this case. If the well was completed in advance of the visit, then all the work was done before Burke had any notice that plaintiff was drilling the well. Such was Burke's contention, and the one evidently accepted as the fact by the trial court. If he had known such work was in progress and made no objection and allowed its completion, then under § 6237, Rev. Codes 1905, he as owner would "be presumed to have consented to the doing of any such labor or the making of any such improvement, if, at the time, he had knowledge thereof and did not give notice of his objection thereto to the person entitled to the lien." Plaintiff's own testimony as to the date of his completion of the work is wholly indefinite. In his direct examination he says: "Think we finished up the 16th day of July." Again on cross-examination he was asked: "When do you claim you finished the well?" To which he answered: "Some time from the 11th to the 15th day of July, I could not say the date." In his sworn statement of lien, he has fixed July 11th as the date of completion, and this date was fixed by him, the date of the lien being August 29, 1907, about six weeks after the completion of the work, while his testimony concerning the date was given four years after the work was done, and nothing is shown from which the witness could refresh his recollection as to dates, and with the witness probably testifying with knowledge of the necessity, to enable plaintiff to recover, of fixing the date of completion as after the time of the visit by Burke to the farm and his acquisition of knowledge of the work. It is true Price has testified to having seen and talked with Burke about the well once after the initial conversation, June 3d, which second conversation he places as occurring "while we were working there." And again: "It must have been somewhere around about the latter part of June." He was then asked: "Who was present at that conversation?" To which he answered: "Nobody but himself and me."

He then testifies he never saw Burke on the farm, but "once afterwards I did."

Q. When?

A. A few days.

Q. After what?

A. After he was out there the first time.

Q. When was that?

A. I cannot tell the date.

Q. About when?

A. Sometime in June or July, while we were working at the well.

Q. How long before you finished this well do you claim you talked to Burke at the farm?

A. I did not talk to him at the farm; I talked to him in Sawyer.

Q. Didn't have any talk with him at the farm?

A. Not a word.

Q. Where was he on the farm when you claim you saw him?

A. In the yard in an automobile.

Q. Drove right out again?

A. He was there a few minutes talking to his tenant, and they went off.

Then again he gave the following testimony:

I think we finished up on the 16th day of July.

Q. During the time did you see anything of Burke, the defendant?

A. Yes, sir.

Q. When and where did you see him?

A. I saw him at the farm there once, and I met him on the road and talked to him in Sawyer after he had been out.

Q. Were you drilling?

A. I had come to town for some gasoline.

Q. Where did you first see him that day?

A. Just before he got to his place in an automobile.

Q. Before he turned in?

A. Just within half or three quarters of a mile.

Q. He was headed toward his farm?

A. Yes, sir.

Q. When did you see him again?

A. I saw him that same day after he came back to town.

Q. Whereabouts?

A. In Sawyer.

Q. What talk did you have with him that day?

A. Just a few words. He says, "You are getting down quite deep."
I says, "Yes, deeper than we expected."

He says, "Well, I have got to have water."

Q. Did you finish the well complete?

A. Yes.

Q. Did you test it?

A. Yes, sir.

Q. What test did you make, what did it stand?

A. We pumped it thirty-six hours with a gasoline engine and it was working as well as any well could be made to work.

Q. You kept it going steady for thirty-six hours?

A. Yes, about in that neighborhood, but I would not swear to the exact time, but we pumped it for practically three days.

Then again the plaintiff gave the following testimony under cross-examination:

Q. You talked with him again after that in Minot?

A. I talked to him after that on the train going down.

Q. You did not talk to him at his place?

A. No, sir.

Q. You did not see him on the place, did you?

A. No, sir.

And witness testifies to an offer of compromise settlement made by Burke to him. And again: "Just shortly after the well was done I told him the well was done. He said, 'All right, send me your statement and I will send you a check.' I done so and I did not hear anything of him. The next I came up to see him he said he was too busy to talk to me. We were going down on the train and he would settle on the train." It was then that an offer of compromise was made by Burke. One Larent and wife were working for Myatt on Burke's farm and they both testify to Burke telling Myatt to go ahead and put the well down, but as to whether this was in reference to the well in the *coulée*

or the drilling of a new well, their testimony is merely their conclusion or inference. And in addition thereto they testify to the following: "Price told Myatt that he heard that he wanted to put a well down, get a well, and Myatt said he did; and so Price told him what he would put the well down for, and Myatt said it was all right with him to have the well dug." This contradicts plaintiff's own testimony and theory of his case, based upon an express contract with Burke made at Velva.

Q. What did he say the price was?

A. \$1.50 a foot.

Q. Anything else said about Burke?

A. Price said he didn't want to put the well down until he saw Burke.

Q. Do you remember seeing Burke there during that time? (referring to while the well was being drilled).

A. Yes, sir.

Q. How many times.

A. One that I know of.

Q. What was he there with?

A. With an automobile.

Q. Do you know who was there with him?

A. No, there was another man, but he was a stranger to me.

Then on cross-examination Larent gave the following testimony:

Q. Was he there when they were drilling or pumping?

A. They were drilling.

Q. Weren't they through pumping at that time, after those three or four days' pumping you talked about?

A. No, sir, he was there during the time they were drilling; they had just started a little while; I don't know how long they had drilled before he came out there.

Q. How do you fix it they were drilling?

A. Price went to town for gasolene the same day Burke was there.

This is the same trip Price says he made for gasoline, and identifies the visit as the one Burke admits having made July 12th. Other wit-

nesses testify to having used the well themselves, or seen others use the well that year.

Burke denies ever having had the conversation in Sawyer above referred to, but says that he met a team on this trip to the farm on July 12th, and that the team was frightened, and while he did not recognize Price, yet it might have been he. Plaintiff's witness Newman also testifies that Burke was at the farm twice while the well was being drilled; that they were drilling while he was there; that they tested the well by pumping it with a gasoline engine for three days; that he was working for Price at the time, but had just before commencement of this job sold Price the well-boring outfit with which the work was done, and to that extent is an interested party in this suit. He does not know the date of the completion of the well; that he had talked to Myatt about the digging of this well before he sold the well machine used in digging it to Price. Burke's testimony is that he had no knowledge of the well being bored until it was completed; that he never had any talk with Price in Sawyer or Velva except the time he told him he did not want him to drill a well; that Price came to his office in Minot some little time after the 12th of July and inquired of Burke himself, if Burke was in, not recognizing him, and, on being informed by Burke who he was, told him that he came to get his pay for drilling the well, that the well was all right and was 401 feet deep. Burke testifies positively that he never saw Price between the moment he spoke with him on June 3d and this interview in the office; that he had some talk with Price at that time at his office, and as a matter of compromise offered to measure the well, and if the well proved satisfactory to settle it at \$1 a foot, which compromise offer plaintiff would not accept. But that before Burke would agree to do that he would want to measure the well and know it was that deep, and find out if it would give a sufficient supply of water to answer all the purposes that a well should, and that a well of that depth would necessitate a windmill. And testimony is offered bearing only on the equities of the case, that the well has always been worthless and has never been used, as appears from the testimony of half a dozen near neighbors to the land in question.

It is apparent that a substantial conflict exists in all facts upon which the liability of the defendant to pay for the well could be predicated. Under Burke's testimony his tenant was not authorized to drill any

new well, but merely to fix the old one. That Price did not rely on any authority from Myatt, on the theory that he was Burke's authorized agent in the first instance, is clear, because the proof is that Myatt sent Price to Burke and Price asked Burke for authority to dig the well. And here arises a direct conflict in testimony, and from the testimony of Burke and the bystander Strong, it would appear that Price was refused the job, which if true, and it would seem that the preponderance of the evidence here favors the defendant, Price thereafter acted at his peril in ever getting anything for his work, or taking just what Burke thereafter saw fit to pay. Plaintiff claims Burke referred him to Myatt. This Burke denies, and Strong's testimony supports Burke on this. Plaintiff has also sought to show a later implied consent sufficient under the mechanics' lien statute to obligate Burke to pay him for the well. In number of witnesses testifying on this point, the advantage is with the plaintiff; but the testimony of each witness, when carefully scanned and weighed, contains contradictions, inconsistencies, and matters of self-interest, to be considered in passing upon the question of credibility. Besides, the witnesses are testifying to matters four years old, and may follow their inclinations more or less and shade their testimony in plaintiff's favor without much fear of detection. In weighing the testimony as to time there is one thing we consider established to a reasonable certainty, and that is that Burke was not present at the farm in question between the interview with plaintiff in Velva on Sunday, June 3, 1907, until July 12th following, and that the testimony of witnesses who say they saw Burke at the place at an earlier time is not the fact. Neither is it probable that Burke had any interview with plaintiff in Sawyer. Plaintiff has testified to seeing Burke once on the farm prior to July 12th and to the conversation had with Burke on July 12th in Velva, which if it had occurred might have estopped defendant from denial of liability. And plaintiff has also testified that he never saw defendant on the farm. We accept the latter statement as the truth under all the probabilities. And the fact that there is in evidence a carbon copy of a letter from Burke to Myatt, dated at Minot June 19, 1907, would seem to be some proof that Burke was not there around that date, or he would not have taken the trouble to write the directions there given to his tenant. As to the condition of the well at the time of the single visit of Burke on July 12th, it

would seem to us that the preponderance of the evidence, notwithstanding the testimony of conclusions to the contrary, is in substantiation of the testimony of the defendant and to the effect that the well was completed and either tested or undergoing a test at that time, which test plaintiff testifies proved that the well was satisfactory and was then complete. The testimony of plaintiff and his witnesses Newman and Larent establishes the fact that three days' time was taken with this test, plaintiff and Larent and Newman all testifying that the test occupied three days' time. And latest date plaintiff will fix for the completion of the well is given in his direct examination as the 16th day of July, and on cross-examination "some time from the 11th to the 15th of July, I could not say the date;" and which date of completion has been fixed by him in his sworn statement of lien, filed within two months after the completion of the well, as July 11th. Granting that the pumping continued until the 15th, assuming his own testimony to be true, the well had been completed on the 12th, the date Burke was there, and when he was informed that it was complete and dug to a depth of 401 feet and had sufficient water because it had then been tested by pumping. At least, the testimony is in conflict as to the exact time of completion, as also as to whether the well was dug or not under a contract between Price and Burke, to such an extent that we must give weight to the findings of the trial court on these questions, it having found adversely to the plaintiff thereon by dismissing this action, and that "the services rendered by the plaintiff for which a claim of lien is made upon the premises described in the complaint were not rendered or performed under any contract between plaintiff and defendant, nor between plaintiff and any person authorized to act for or on behalf of the defendant." This explicit finding is supported by a preponderance of the proof on the question of contract, and under all the evidence we cannot say that plaintiff by a preponderance of the proof established any facts upon which defendant can be presumed to have consented to the making of such improvement, it not appearing from the proof that he had any knowledge that such labor was being performed or such improvement being made, assuming that it is an improvement, during the time the same was being dug; and it affirmatively appeared by substantial proof that his first knowledge thereof was after the same had been finished, since which time he has done nothing to estop him

from refusing to pay for such work performed by a trespasser. Appellant relies upon § 6237, Rev. Codes 1905, of the mechanics' lien law, providing that an owner shall be presumed to have consented to the making of an improvement if he had knowledge thereof and did not give notice of his objection to the person entitled to a lien. But under these facts this statutory provision can have no application, as manifestly the time mentioned in the phrase, "if at the time he had knowledge thereof," means at the time of the doing of the work or the making of the improvement, and does not apply to a case of this kind where the work was done and the improvement completed before knowledge of it was acquired.

Our mechanics' lien law, §§ 6237-6251, is a broad one, and grants to those who may by compliance with its terms obtain a mechanic's lien superior rights to those enjoyed by those not so favored. To comply with its terms is easy. The scope and method of proof in equity actions simplifies the establishment of any valid claim and places before a court all the facts and circumstances. Under such conditions the proof should disclose a clear right to recover. Any other rule is liable to result in confiscation of property, especially in cases similar to the one before us.

We affirm the judgment of the trial court dismissing this action.

BURKE, J., being disqualified did not participate.

STATE OF NORTH DAKOTA EX REL. ANDREW MILLER,
Attorney General, and Max Stern, Relator, v. WALTER C. TAY-
LOR, Commissioner of Insurance of the State of North Dakota,
and as such Commissioner of Insurance, Gunder Olson, State
Treasurer of the State of North Dakota, and as such Treasurer.

(145 N. W. 425.)

By chap. 194, Laws of 1913, entitled, "An Act Establishing a State Bonding Department in the Office of the Commissioner of Insurance, Providing for the Maintenance Thereof, and Creating a Reserve Therefor, Prescribing the Duties of Officers Connected Therewith, Providing for the Payment of Premiums and of Indemnities for Losses, and providing for the Disposal of the Surplus after

Such Reserve Has Been Created," it was attempted to establish a bonding department, to bond certain county, city, village, township, and school district officials at the expense of the subdivisions of which they are officials. It is held:

Legislative power — delegation of — unwarranted — premiums — administration officers — bonding fund — payment of losses — payment of expenses — limitation — subdivisions — officials of.

1. Following State ex rel. Rusk v. Budge, 14 N. D. 532 (the Capitol Commission Case), that said chap. 194 is invalid as an unwarranted delegation of legislative power to administrative officers, for the reason that said chapter provides for the payment of premiums by the subdivisions of the state, which premiums constitute a bonding fund, and it attempts to give to the commissioner of insurance the arbitrary power to determine how much of such fund shall be applied to the payment of losses, and how much to the payment of deputies, clerk hire, and other expenses of the department, and, particularly, because no limitation is placed upon the amount which may be devoted to the last-mentioned subject.

Unwarranted delegation of judicial power — administrative officers — officials of subdivisions of state — bonds of.

2. Following State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, said chapter 194 is invalid as an unwarranted delegation of judicial power to purely administrative officials, in that it commits to the commissioner of insurance the sole right to determine the amount due subdivisions whose officials are insured, by reason of any default or violation of official duties, and also delegates to the auditing board the power to determine when bonds of insured officials shall be canceled, which are judicial functions.

Invalidity — taking property without due process — commissioner of insurance — judge — jury — conflicting capacities.

3. Said chapter 194 is also invalid because it provides for taking the property of counties, cities, and other subdivisions of the state without due process of law, in that it is an attempt to authorize the commissioner of insurance to determine the amount due to any such subdivision whose official it is claimed has defaulted, or been guilty of malfeasance in office, without notice to such subdivision, or any opportunity for a hearing on the subject, or any other provision for determining, by means of any channel for the administration of justice, any question of liability which may arise between the subdivisions and the bonding department. It is attempted to constitute the insurance commissioner the judge and the jury, as well as the custodian of the fund, and to impart to him the power to serve in these conflicting capacities.

Opinion filed December 29, 1913. Rehearing denied February 11, 1914.

Original application to this Court for the issuance of its writ prohibiting and enjoining the Commissioner of Insurance of the State from putting into effect the provisions of chap. 194, Laws of North Dakota for 1913, requiring him to establish a bonding department to go into operation on the 1st day of January, 1914.

Writ granted.

Lawrence & Murphy and Pierce, Tenneson, & Cupler, and Bangs, Metcher, & Hamilton, for plaintiffs.

It is clear that the state intended to engage in the business of furnishing bonds to counties and other subdivisions, to indemnify against loss by the default of public officials of such subdivisions. Laws of 1913, chap. 194.

Such act is in violation of § 185 of the Constitution of this state. It is also in violation of §§ 1 and 23 of our Constitution. *Rippe v. Becker*, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; *McCullough v. Brown*, 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458; 1 Bl. Com. 138; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Cooley*, Const. Lim. 4th ed. 719; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 756, 28 L. ed. 590, 4 Sup. Ct. Rep. 652; *George Bolln Co. v. North Platte Valley Irrig. Co.* 19 Wyo. 542, 39 L.R.A.(N.S.) 868, 121 Pac. 22.

The law or bonding act under consideration is discriminating, in that it requires only certain county officials to furnish bond with the state as surety, permitting others to take such bonds at their option; permitting the state to withdraw from any bond, and refusing to become surety on any bond greater than a given amount. *State ex rel. McKell v. Robins*, 71 Ohio St. 273, 69 L.R.A. 427, 73 N. E. 470, 2 Ann. Cas. 485; *George Bolln Co. v. North Platte Valley Irrig. Co.* 19 Wyo. 542, 39 L.R.A.(N.S.) 868, 121 Pac. 22.

This act is also in violation of the Federal Constitution, in that it takes property without due process of law. Fed. Const. 14th Amend. § 1.

Andrew Miller, Attorney General, *John Carmody*, and *Alfred Zuger*, Assistant Attorneys General, for defendants.

There is no constitutional provision in this state requiring any of-

ficer to furnish bonds. Those officers of whom bonds are required come under the provisions of statute law. Rev. Codes 1905, §§ 400-415, and amendments.

In the absence of a constitutional provision, the legislature has the right to prescribe qualifications for office, such as taking oath and giving bond, etc. 29 Cyc. 1375.

The state Constitution is a limitation of power, and the legislature has supreme power except where limited. Cooley, Const. Lim. 7th ed. 242; Ensley Development Co. v. Powell, 147 Ala. 300, 40 So. 137; Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902.

The legislature has power to enact any law not prohibited by the Constitution. Ex parte Roberts, 166 Mo. 207, 65 S. W. 726; Radcliff v. Wichita Union Stock-Yards Co. 74 Kan. 1, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 86 Pac. 150, 10 Ann. Cas. 1016; Hinton v. Perry County, 84 Miss. 536, 36 So. 565; State ex rel. Henson v. Shepard, 192 Mo. 497, 91 S. W. 477; Wallace v. Reno, 27 Nev. 71, 63 L.R.A. 337, 103 Am. St. Rep. 747, 73 Pac. 528; Ex parte Boyce, 27 Nev. 299, 65 L.R.A. 47, 75 Pac. 1, 1 Ann. Cas. 66; Com. v. Mallet, 27 Pa. Super. Ct. 41; Re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; People v. Young, 18 App. Div. 162, 45 N. Y. Supp. 772; State ex rel. Nichols v. Cherry, 22 Utah, 1, 60 Pac. 1103; Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; Missouri River Power Co. v. Steele, 32 Mont. 433, 80 Pac. 1093.

SPALDING, Ch. J. This is an original application to this court for the issuance of its prerogative writ to prohibit and enjoin the state commissioner of insurance from proceeding to establish and put into operation a state bonding department. It is designed to test the constitutionality of chapter 194 of the Laws of 1913, entitled, "An Act Establishing a State Bonding Department in the Office of the Commissioner of Insurance, Providing for the Maintenance Thereof, and Creating a Reserve Therefor; Prescribing the Duties of Officers Connected Therewith, Providing for the Payment of Premiums and of Indemnities for Losses, and Providing for the Disposal of the Surplus after Said Reserve Has Been Created."

Section 1 of such act reads: "A bonding department of the state

of North Dakota is hereby established, under the management and supervision of the commissioner of insurance." Section 2 authorizes the commissioner of insurance to appoint a deputy and engage clerks as may be necessary to conduct the business of the state bonding department, fix the salaries therefor, and provides that they shall be paid out of the bonding department fund. Section 3 requires such bonding department to bond counties, cities, towns, townships, and school districts in any county in the state, against losses by default of any officer, upon the terms and in the manner later set forth in such act, and that the commissioner shall draw up, with the assistance of the attorney general, a standard form of surety bond, which only shall be used. Section 4 provides that each county official, except justice of the peace and constable, every assessor required by law to furnish a bond, every city, town, school district, and township treasurer required by law to furnish a bond, shall be bonded by the state bonding department, with this proviso, that it shall not bond any official for a greater amount than \$50,000, and any official required to be bonded in a greater sum than \$50,000 shall bond, as to the excess, with a responsible surety company, or in any manner satisfactory to the proper authorities. It further makes it optional with township and school district treasurers, to be bonded by the state bonding department, and requires the premiums on all bonds furnished by that department to be paid out of the appropriate public treasury. Section 5 fixes a flat rate of premium on bonds of all officers at 25 cents per hundred dollars of bonds per year, to be paid in advance by the proper authorities to the state treasurer, and that the minimum premium on small and short term officers' bonds shall not be less than \$2.50. Section 6 provides that money paid into the state treasury for premiums for bonding officials shall be known as the state bonding department fund, and used as provided in the act. Section 7 prescribes the duties of the state treasurer in regard to receiving premiums and issuing receipts, etc. Section 8 requires all bonds issued by the department to run until the expiration of the officer's term of office, and provides that, when such term is less than one year, a full year's premium shall be charged. Section 9 requires the commissioner of insurance to estimate, at the beginning of each year, the amount required for salaries and expenses of the department for the current year, and to reserve the same from the premiums received,

and makes the amount of premium receipts remaining available for payment of losses. It requires losses to be paid promptly as soon as the amount shall be determined by the commissioner of insurance and a report thereof made, and that any sum remaining unexpended at the end of any year shall remain in the state bonding fund until the amount of \$100,000 is accumulated, after which any excess over that sum shall be distributed to the various counties, etc., in proportion to the amount of premiums paid into the fund by the same, and that, in case there are not sufficient funds to meet the losses sustained after the reservation of expenses for the year, such losses shall be paid as funds are accumulated in the bonding fund by the collection of premiums. Section 10 provides for reports to be published and made to the governor and legislative assembly. Section 11 requires the commissioner to obtain from the various bonded officials annual statements of their receipts and disbursements, etc., verified by an officer, and provides how the commissioner shall verify such statements, and requires him to furnish application blanks to the proper officers. It then provides, that, if, in the opinion of the commissioner of insurance, "it is advisable for the safety of the state to reject an application for a bond, or cancel the bond of any official bonded, he shall submit such application, also the person's name whose bond he proposes to cancel, to the state auditing board, together with his reasons for rejecting or canceling the same, and if the auditing board rejects such application or cancels any bond, such official may bond in any manner satisfactory to the proper authorities of the city, village, school district, township, or county, as the case may be." It then provides for notice of the rejection of any application by the board being given to the official, and that before a bond is canceled the commissioner shall notify such person by registered mail, demanding from him a receipt thereof, and upon the return of such receipt, that the board shall cancel such bond six days thereafter, and that, when a default is reported, the commissioner shall carefully inquire into and investigate the same before the indemnity is paid; that the state examiner shall examine and check the accounts of a defaulting official, and file his report with the commissioner of insurance, stating the amount due upon the defaulting officer's bond.

Many grounds are presented by the applicant upon which he claims the statute is in conflict with the Constitution. It will not be necessary

to pass upon all of these questions. We only pass upon some which are too plain to justify any controversy. The fact that other grounds urged by relator are not passed upon is not to be taken as a determination one way or the other.

On behalf of the state, among other things, it is contended that the law is not obnoxious to the Constitution, because there is no express provision in the Constitution prohibiting the state from establishing a bonding department or conducting a bonding business. There is no question of the correctness of this rule as a general principle, when to it are added implied prohibitions; and it may be necessary to take other things into consideration besides those found on the face of the Constitution. Courts must often determine what the object of a provision of that instrument is, and to do this, apply it to conditions existing at the time of its adoption, and thereby determine from the facts, as well as the language of the instrument, whether it has relation to a given condition or law.

It is also urged by the state under this head, that the state has the broadest powers imaginable to engage in any business or occupation, not in terms prohibited by the Constitution. It seeks also to justify this law by the assertion that surety companies were charging excessive rates of premium when it was enacted, for furnishing bonds for public officials, and that the state can do the business at less expense to the municipalities or communities required to bond their officials. On the other hand, it is urged that figures presented on argument show the rates charged by the surety companies, if correctly quoted, and those under this statute, do not harmonize. The surety companies charge different rates on bonds for different officials, the rate depending largely upon the character of the risk, it being highest for those offices where the opportunity and temptation for speculation and the skill required are greatest, while the state rate is the same regardless of the risk. Naturally this results, according to the tables presented, in a number of officers being required by the surety companies to pay a higher rate than is contemplated by the flat rate established by the statute in question, while some officers pay a lower rate to surety companies than to the state. All such comparisons, however, are beside the issue.

The state was not organized as an institution to engage in any line of private business, whenever, in the judgment of some legislative

assembly, it might be thought that it could conduct business more cheaply than is done by individuals or private parties. It is contended, however, that this act is intended for the protection of subdivisions of the state itself, and is therefore justifiable. This question is not determined.

1. The act in question is invalid because it is an unwarranted delegation of purely legislative powers to the commissioner of insurance. It requires counties, cities, and other subdivisions of the state to pay premiums, the total sum so paid constituting the bonding fund. This fund is only limited by the number of officials and subdivisions coming within its provisions, most of which are required to do so, while with some others it is optional.

From the total fund the commissioner is authorized to arbitrarily determine how much will be necessary to pay deputies, clerks, and the other expenses of his department, and is required to set aside from such fund the amount so decided upon by him. No limit is placed by the act in question upon the amount which may be used for these purposes. It is left solely with the commissioner, and only the remaining part of the fund is available to pay liabilities incurred during each year. The separation of this fund into two parts, one for the payment of expenses and the other for the payment of losses, is a legislative act, and the very least that the legislature can do and have the act valid in this respect is to place a limit upon the amount of the fund to be used in the payment of expenses.

The people, through their Constitution, have very jealously guarded the functions of the respective departments of government. The legislative assembly has been given the sole power to legislate. While it is true that it is often difficult to determine whether a specific act falls within the legislative function or the executive, we are not hampered by any uncertainty in the case at bar. This court recently passed upon a very important case, as nearly identical with this as two cases can well be. In *State ex rel. Rusk v. Budge*, 14 N. D. 532, 105 N. W. 724, known as the Capitol Commission Case, this court passed upon an act providing for the erection of capitol buildings at the seat of government. That act dealt with an indefinite fund, authorized a commission appointed by the governor to construct two buildings, a capitol and an executive mansion, and left it to the determination of the commission

what portion of the fund should be employed in the erection of each of the two buildings. No limit was placed upon the cost of the executive mansion, and, we may say, not more than an implied limit upon the total cost of the two. That case was very thoroughly briefed and carefully considered by this court when no member of the present court sat upon this bench. The court said: "The commission has absolute power under this law to fix the limits of the cost of each of said buildings. They finally determined what sum shall be used for each building. We think that such discretion should have been exercised by the legislature. It is not properly an administrative discretion. What the several buildings shall cost should have been limited by the act, as it is a substantive matter of legislative discretion that the legislature cannot delegate. . . . They are purely and clearly legislative powers, and cannot properly be delegated to persons or boards." After citing authorities, the court continues: "These cases, as well as those cited as bearing upon the powers of the legislature, unite in the general principle that agents or officers cannot be intrusted with powers of purely governmental or legislative character. They announce a salutary principle of constitutional law which should not be departed from."

In Minnesota, Pennsylvania, and Wisconsin, it has been held that the legislature cannot delegate to a state insurance commissioner the preparation of a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as may be indorsed thereon, or added thereto, and to which all subsequent insurance contracts must conform, as this is a delegation of legislative power. *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738.

2. The act in question is invalid because it is an unwarranted delegation of judicial power to the commissioner of insurance, and to the other officials named in the act. It permits and requires the trial and determination of questions of both fact and law, relating to the cancellation of bonds and to the payment of losses and to the violation of other duties of the officials included in the act, including the validity of the claims of subdivisions of the state on the fund, and indirectly the

liability by the officers named, by the officials named in the act, none of whom are judicial officers. It gives the commissioner of insurance the arbitrary power to determine when a default or a liability exists, and the power to fix the amount of the liability to the county or other subdivision. Neither is this arbitrary power on the part of the commissioner limited to the determination of the amount of any defalcations which may occur.

The bonds required of most, if not all, the officials enumerated in the act, are conditioned for the faithful and impartial discharge of the duties of the office, in addition to the condition requiring a true account of all moneys and property of every kind that may come into the official's hands. Some of the officials named received no money in an official capacity, and the condition of the bond only relates in such cases to the faithful and impartial performance of the duties. It is too evident to permit discussion that before a recovery can be had upon a bond of this nature, or that part of the bond of a treasurer or other official who does receive money, which relates to the faithful and impartial discharge of the duties of his office, someone must determine whether the conditions of the bond have been violated, and if so, the extent of the injury resulting therefrom to the county or subdivision of which he is an official. Would anyone contend that the determination of such liability and the extent of the injury, if any, is not a judicial act, rather than an administrative or executive duty? It involves not simply a computation in dollars and cents, and thereby the ascertainment of a fact, but the determination of legal questions relating to the duties of an official, the finding of facts, and the application of the law to the facts, and in effect the rendition of a judgment on the facts so found and the law as ascertained and applied, and it seems to us as clearly a judicial act as devolves upon any court in the determination of the issues in any form of action.

We have had so recently under consideration a statute, in most of these respects and in principle, parallel with this, that no extended discussion of the subject or citation of authorities is necessary. If anything, this act more clearly delegates judicial powers than did the one to which we refer. In *State ex rel. Standard Oil Co. v. Blaisdell*, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089, we had under consideration a statute giving the secretary of state powers similar to

those here attempted to be conferred upon the commissioner of insurance, and it was therein held that the act was invalid because it delegated judicial power to an executive officer, as well as deprived a party of property without due process of law. We then held, that, as applicable to that case, judicial power consisted in the authority vested in some court, officer, or person, to hear and determine when the rights of persons or property, or the propriety of doing an act, is the subject-matter of adjudication, and that official action, the result of judgment or discretion in such case, is a judicial act.

The terms of the statute under consideration bring the duties sought to be imposed upon the commissioner of insurance and auditing board squarely within that definition. Judicial power determines what the law is, and what the rights of the parties are with reference to transactions already had, and wherever an act undertakes to determine a question of right or obligation or property, as the foundation upon which it proceeds, such act is to that extent a judicial one. *Sinking Fund Cases*, 99 U. S. 761, 25 L. ed. 516; *Wulzen v. San Francisco County*, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353. It is also defined as "the province of deciding private disputes between or concerning persons." *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52, and authorities cited in note 5, 6 Am. & Eng. Enc. Law, 1032.

A constitutional grant of judicial power to one department carries the whole judicial power of the state, and excludes any exercise thereof by other departments. 6 Am. & Eng. Enc. Law, 1053. To assume to vest judicial functions elsewhere than in the tribunal established by the Constitution is clearly without the sphere of legislative action, and statutes which attempt to confer judicial powers upon executive or ministerial officers are invalid. *State ex rel. Hovey v. Noble*, 118 Ind. 350, 4 L.R.A. 101, 10 Am. St. Rep. 143, 21 N. E. 244; *United States v. Rider*, 50 Fed. 406; *People ex rel. Kern v. Chase*, 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454; *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551. These principles are so strictly adhered to that it is held in states where law and equity are separately administered, that no interference can be had in the respective jurisdictions of courts of law and of equity. Indeed, it is also held that the legislature cannot transfer to an inferior court any of the established powers of the supreme court created by the Con-

stitution. *Carpentier v. Montgomery*, 13 Wall. 480, 20 L. ed. 698; *Conger v. Convery*, 52 N. J. L. 440, 20 Atl. 166.

3. The protection of surety companies is of no greater importance than the protection of the counties, cities, and other subdivisions whose officials are required to furnish security through the bonding department. In fact, the protection of the taxpayers of these divisions is of supreme importance. If, in any such subdivision, a defalcation occurs, or even if it is claimed that an official has been guilty of embezzlement or misconduct, imposing a liability upon his bondsmen, and the parties disagree on any such question, it is the right of such subdivision to have the question of the defalcation or other misconduct determined, and the amount of the liability, if any, adjudicated and established by the constitutional body constituted for such purpose. And it is equally the right of the municipality or subdivision to be given due notice of time and place for the consideration and adjudication of all disputed questions. This act furnishes no such protection to the public. Neither notice, hearing, nor time is provided for.

It is fundamental in all civilized governments, at least in those where the people have any conception of justice and of its administration, that no person or institution can be deprived of property without due notice and an opportunity to be heard, and a law which fails to provide these, and places it in the power of any official to arbitrarily determine a right, without affording the person or the municipality or other organization interested any opportunity for preparation and hearing by a body constituted for such purpose, when there are such bodies provided by the Constitution, deprives that person or community of property without due process of law, and no right of an American, whether an individual or a community, is more sacred than the right thus attempted to be protected through the organic law of the state and of the nation.

The definitions of due process of law are various, and it is extremely difficult to formulate any definition which is applicable in all cases or to all proceedings. One of the most frequently quoted definitions was given by Mr. Webster in the celebrated *Dartmouth College Case*, and has been cited by many courts with approval, as coming probably as near to a general definition as any that has been announced. It is: "By 'the law of the land' is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and

renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void." *Dartmouth College v. Woodward*, 4 Wheat. 518, 581, 4 L. ed. 620, 645.

One essential to due process of law, one, perhaps, which is applicable to as large a class of cases as any we find, is given in *McGehee on Due Process of Law*, p. 1, and is substantially the same as found in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. " 'Due process of law,' as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing." And that author makes the following observations: "The basis of due process, orderly proceedings, and an opportunity to defend, must be inherent in every body of law or custom, as soon as it advances beyond the state of uncontrolled vengeance; indeed, the emphasis placed on a literal adherence to customary rules of procedure is one of the most marked features of primitive law, and with the advance of civilization and the application of reflection to old collections of custom, the principle of notice and an opportunity to defend would take its place, as a part of the *jus gentium*, to become later the law of nature or the law of God."

It was said in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292: "In this country written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. It necessarily happened

therefore, that, as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation."

In *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559, it was said: "As to the words from Magna Charta incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Chancellor Kent says in vol. 2 of his Commentaries, p. 13, that "'due process of law' means law in its regular course of administration through courts of justice." While it is true that the proceedings need only be appropriate to the case, and just to the parties to be affected, in *Hagar v. Reclamation Dist.* 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, it is deemed essential that there must be notice and an opportunity to be heard before some official board or court, whenever life, liberty, or the title or possession of property are involved. Fortescue, J., in *Dr. Bentley's Case*, *Rex v. University of Cambridge*, 1 Strange, 567, said: "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defense. 'Adam' (says God) 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also. This doctrine was adopted into American jurisprudence to the fullest extent, and was referred to the principles either of natural justice, of international law, or of the common law." McGehee, *Due Process of Law*, 75. Judge Story said: "It is a rule founded upon the first principles of natural justice, that a party shall have an opportunity to be heard in his defense, before his property is condemned;" and the Supreme Court of the United States in *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959, and

in *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, says: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." The clauses of our Constitutions guarantying the law of the land and due process of law have always been held to include the opportunity to present any defense which might affect the decision of the court or tribunal. The opportunity to defend implies notice of an official inquiry into the facts, and notice and hearing are necessary to due process of law,—are, indeed, the essential elements thereof. *McGehee*, *Due Process of Law*, 76; *Simon v. Craft*, 182 U. S. 436, 45 L. ed. 1170, 21 Sup. Ct. Rep. 836; *Hooker v. Los Angeles*, 188 U. S. 318, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395. The notice of the proposed course of action which will result in the taking of life, liberty, or property must, in order to be due process, be reasonable in time, so as to give a real opportunity to present defenses (*McGehee*, *Due Process of Law*, 77), and this right to due process must rest upon a basis more substantial than favor or discretion. *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

Under the terms of the act we are considering, the insurance commissioner is the judge and the jury, as well as the custodian of the fund, and to him it is attempted to impart the power to serve in all these capacities, and determine the validity of the claims made by any subdivisions of the state to a part of the fund. It will thus be seen that it is serving in substantially conflicting capacities. There is no contract on the part of the state to pay. There is no one whom the municipality can sue to enforce the so-called bond. If a claim of liability is made, the state cannot be sued, because it has not contracted or been made liable, and further, if it could be sued, no judgment obtained by a municipality could be enforced, because the only manner provided by statute for enforcing a money judgment against the state is by means of a tax, and no judgment can be paid, and no action can be maintained, until the state auditor has rejected a claim; but the state auditor

has nothing to do with claims of liability under the provisions of this statute. It is left wholly with the commissioner of insurance to be paid only out of the bonding fund, and mandamus will not lie against the commissioner, because the settlement of losses and liabilities involves, as we have shown, acts of judicial discretion and judgment, not ministerial, and an action cannot be maintained against the bonding department, for that is not an entity, and has only agreed to pay in case the commissioner says payment shall be made. Counsel for the state argues that "no resort can be had against the state or any of the other political subdivisions, to meet any such expenses or losses." It is apparent that the enactment in question does not provide due process of law, and that such process is not furnished by any other provision in our Code applicable to the proceedings contemplated by the enactment under consideration. The writ prayed for will issue.

BURKE, J., (dissenting). Am unable to concur in the majority opinion, because it ignores the principal question sought to be raised, and misstates the contention of the state.

The parties to this litigation wished to have settled the right of the state to enact this class of legislation, and not whether there were minor defects in the bill itself. The majority opinion fails to give any light upon this question, and the next legislature will be totally in the dark as to its powers in the premises. While there are minor defects in the law as pointed out in the majority opinion, I think they can be remedied by amendment.

LOUIS PETERSON v. W. G. MAHON et al.

(145 N. W. 596.)

A man named McCain located at Fergus Falls, Minnesota, in January, 1911, and assumed the name of Bell. He rented offices, had the same remodeled, and advertised as a real estate dealer. Shortly thereafter, he went to a local attorney, who was also a notary public, and employed him to draw up a deed covering 120 acres of land near the city, which deed purported to run from the owner of the land to himself under the name of Bell. Next day the im-

poster Bell took the blank deed before the defendant Mahon, a notary public of Fargo, North Dakota, and impersonated the owner of the land. Mistaking the imposter for a man with whom he was acquainted, the notary took his acknowledgment, and certified that it was the owner of the land who had appeared before him and acknowledged the deed. The imposter returned to Fergus Falls, and had the same attorney prepare a deed running from himself under the name of Bell to the plaintiff Peterson, and executed and acknowledged the deed under that name before such attorney, as a notary public. Plaintiff paid \$930 for the deed, which amount he has lost.

Evidence — negligence — proximate cause — injury.

1. Evidence examined, and *held*, that the defendant Mahon was grossly negligent, and that such negligence was the proximate cause of the injury to Peterson.

Evidence — contributory negligence.

2. Evidence examined, and *held*, that the plaintiff was not guilty of contributory negligence.

Motions for directed verdict by both parties — issues — no request to submit to jury — trial court — negligence — contributory — questions of law.

3. At the close of the testimony both parties made motions for instructed verdicts, and made no request to have any issue submitted to the jury. Following *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, *held* that this justified the trial court in taking the case from the jury and deciding the questions of negligence and contributory negligence as questions of law.

Opinion filed February 11, 1914.

Appeal from the District Court of Cass County, *Pollock, J.*

Affirmed.

McEnroe & Wood, for appellants.

The court erred in refusing to grant appellants' motion for a directed verdict. The plaintiff's negligence clearly appeared from the evidence and circumstances, and it was a law question which the court should have resolved in defendants' favor. *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427.

The plaintiff was guilty of such contributory negligence as to clearly establish a proximate cause of the injury. *Ibid*.

The plaintiff did not exercise that ordinary and proper care which a prudent man ought to do, and is guilty of such negligence as must defeat

him. *Oakland Bank v. Murfey*, 68 Cal. 455, 9 Pac. 843; *Homan v. Wayer*, 9 Cal. App. 123, 98 Pac. 80.

The court erred in granting plaintiff's motion for a directed verdict, for the reason that the question of the plaintiff's freedom from contributory negligence was one where reasonable men might differ and draw different conclusions, and should have been submitted to the jury, or defendants' motion should have been granted. *Heckman v. Evenson*, supra; *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390; *Beach*, Contrib. Neg. § 10; *Cooley*, Torts, § 69; *People use of Cook v. Cole*, 139 Mich. 312, 102 N. W. 856.

To sustain an action against a notary for negligence, it must appear that the loss was the *direct* result of his act or omission, and the injury not a collateral or resulting one. *Ware v. Brown*, 2 Bond, 267, Fed. Cas. No. 17,170; *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13; *Swinyard v. Bowes*, 5 Maule & S. 62, 17 Revised Rep. 274; *Franklin v. Smith*, 21 Wend. 624; *Reed v. Darlington*, 19 Iowa, 349; *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250.

A right of action for damages resulting from a tort is not assignable; such an action can only be maintained by the person directly injured. *Ware v. Brown*, 2 Bond. 267, Fed. Cas. No. 17,170; *Comegys v. Vasse*, 1 Pet. 193, 7 L. ed. 108; *Dehn v. Heckman*, 12 Ohio St. 181; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436.

Geo. W. Frankberg and Stambaugh & Fowler, for respondent.

The notary who fails to take an acknowledgment and make a certificate in the form and manner outlined by the statute is liable to the party injured by his official misconduct, regardless of the question of the notary's negligence and regardless of whether the acts of others have contributed to the injury. *Homan v. Wayer*, 9 Cal. App. 123, 98 Pac. 80; *Joost v. Craig*, 131 Cal. 504, 82 Am. St. Rep. 374, 63 Pac. 840; *Kleinpeter v. Castro*, 11 Cal. App. 83, 103 Pac. 1090; *State ex rel. Heitkamp v. Ryland*, 163 Mo. 280, 63 S. W. 819; *People use of Munson v. Bartels*, 138 Ill. 322, 27 N. E. 1091, 152 Ill. 557, 38 N. E. 898; 1 Cyc. 557.

The duty imposed upon a notary in taking an acknowledgment is purely ministerial, and, regardless of the question of negligence, he will be held liable in damages resulting from his failure and official misconduct. *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966;

Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80; Com. use of Green v. Johnson, 123 Ky. 437, 124 Am. St. Rep. 368, 96 S. W. 801, 13 Ann. Cas. 716; Blaes v. Com. 29 Ky. L. Rep. 908, 96 S. W. 802; Samuels v. Brand, 119 Ky. 13, 82 S. W. 977; People use of Doran v. Butler, 74 Mich. 643, 42 N. W. 273; People use of Munson v. Bartels, 138 Ill. 322, 27 N. E. 1091, 152 Ill. 557, 38 N. E. 898; State ex rel. Heitkamp v. Ryland, 163 Mo. 280, 63 S. W. 819; Joost v. Craig, 131 Cal. 504, 82 Am. St. Rep. 374, 63 Pac. 840; Wilson v. Gribben, 152 Iowa, 379, 132 N. W. 849; Kleinpeter v. Castro, 11 Cal. App. 83, 103 Pac. 1090; Fogarty v. Finlay, 10 Cal. 239, 70 Am. Dec. 714; People ex rel. Curtiss v. Colby, 39 Mich. 457.

The plaintiff was not guilty of contributory negligence. Samuels v. Brand, 119 Ky. 13, 82 S. W. 977; Wilson v. Gribben, 152 Iowa, 379, 132 N. W. 849; State ex rel. Kleinsorge v. Meyer, 2 Mo. App. 413.

If the careless act of the notary was *necessary* to the accomplishment of the loss, he alone is answerable for the damages resulting. Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80; People use of Doran v. Butler, 74 Mich. 643, 42 N. W. 273; People use of Munson v. Bartels, 152 Ill. 557, 38 N. E. 898; Kleinpeter v. Castro, 111 Cal. App. 83, 103 Pac. 1090; Oakland Bank v. Murfey, 68 Cal. 455, 9 Pac. 843.

Where both parties move for a directed verdict, and the party whose motion is denied fails thereafter to request that certain questions be submitted to the jury, he will be deemed to have waived a jury trial and to have consented to a decision of *all* questions by the court. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 395; Citizens' Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266.

A notary cannot urge as a defense that others aided in bringing about the loss, *if his misconduct aided* in the loss. Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80; People use of Doran v. Butler, 74 Mich. 643, 42 N. W. 273; People use of Munson v. Bartels, 152 Ill. 557, 38 N. E. 898; State ex rel. Heitkamp v. Ryland, 163 Mo. 280, 63 S. W. 819; Joost v. Craig, 131 Cal. 504, 82 Am. St. Rep. 374, 63 Pac. 840; Wilson v. White, 84 Cal. 239, 24 Pac. 114; Everdson v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Blinn v. Chessman, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666; Weihl v. Robertson, 97 Tenn. 458, 39 L.R.A. 423, 37 S. W. 274; David v. Williamsburgh City Ins.

Co. 83 N. Y. 265, 38 Am. Rep. 418; *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966.

BURKE, J. The facts in this case are not in dispute and may be summarized as follows: A man named McCain went to the city of Fergus Falls, Minnesota, during the latter part of January, 1911, and assumed the name of Edward D. Bell. Upon his arrival he registered at one of the hotels under the name of Bell, and opened negotiations with the First National Bank of that city for the rental of offices over the bank, which at his request were remodeled for his use. Shortly after his arrival he was introduced to an attorney named Frankberg, who had resided in the town all his life and had been practising law for five or six years. Shortly thereafter Bell was introduced to the plaintiff herein, Mr. Peterson, who had lived in the city about three years and was engaged in driving a bus from the said hotel to the railway station. About this time, the daily newspapers contained notice that Edward D. Bell had decided to locate in the city and was opening offices in rooms 9 and 10, First National Bank Building. Plaintiff states that upon Saturday, February 4, 1911, he was introduced to McCain under the name of Bell, although he had seen and heard of him before that time. On the following Monday, the 6th, Bell told plaintiff that he had just bought 120 acres of hay land near the city, and offered to sell same to him at \$16 per acre. Plaintiff replied that he would pay \$14 an acre for the tract, providing he would make as part payment a certain contract for Mexican lands in the sum of \$750. This proposition was accepted by McCain, alias Bell, who went to the law office of Frankberg, and requested said attorney to prepare a blank form of deed running from one Francis M. Rose to himself, conveying the 120 acres in question. Mr. Frankberg asked him his full name, and in reply was told that it was Edward D. Bell; that he had purchased the land from Mr. Rose, and was to meet Rose in Fargo, North Dakota, the next day by appointment, at which time Mr. Rose would sign and execute the deed. Said attorney asked him if Mr. Rose was a married or single man, and received the reply that he was a widower, a recital of which fact was inserted in the deed. When the deed was prepared McCain, alias Bell, took the same into his possession, proceeded by train to Fargo, North Dakota, and walked into the office of

defendant Mahon, who was a notary public. What occurred is told by Mr. Mahon himself as follows:

I thought he was another party. I thought he was Tim Francis, a fellow in town here.

Q. Did he state that his name was Francis M. Rose when you took the acknowledgment, or did he just ask you to take his acknowledgment?

A. He asked me if I would take his acknowledgment. I told him I would. We talked a few seconds, and I sat down and took the acknowledgment. I did not ask him whether his name was Francis M. Rose. He was alone when he came in. . . . I did not know this party at all. Never had seen him before.

With this forged deed in his possession, McCain returned to Fergus Falls, and told Peterson he was ready to close the deal. Mr. Peterson went to Attorney Frankberg, told him of the deal and asked him to examine the title to the tract. Mr. Frankberg went to the courthouse, examined the records, found that the title was in Francis M. Rose, and made some inquiry about the whereabouts of Rose, but only learned that he was not a resident of the county. He thereupon told Mr. Peterson that the title was all right and in Francis M. Rose. Thereafter Mr. Peterson and Mr. Bell went to the office of said attorney and asked him to draw a deed from Mr. Bell to Mr. Peterson, which Mr. Frankberg did, whereupon Mr. McCain, alias Bell, signed the name of Edward D. Bell. Mr. Frankberg, who was also a notary, took his acknowledgment, and Mr. Peterson paid over the sum of \$920 in cash. It was shortly thereafter ascertained that the deed was a forgery, and McCain, alias Bell, was a swindler. Mr. Peterson brings this action against the notary and his bondsmen for the damage which he has sustained and which he placed at the sum of \$930, the cash paid to Mr. Bell, who had not bothered with the Mexican contract. The foregoing facts were established without dispute upon the trial below, and at the close of the testimony each party moved for a directed verdict. The trial court ordered a verdict in favor of the plaintiff, and this appeal is from the resulting judgment. We can dispose of defendant's contentions under three heads: First, that his negligence, if any, was

a remote and not a proximate cause of the injury to plaintiff; second, that the respondent was guilty of contributory negligence as a matter of law; and, third, that in any event the question of his contributory negligence should have been submitted to the jury.

(1) We believe the evidence clearly establishes that defendant was grossly negligent, and this fact is not seriously disputed by appellant, who, however, insists that it was the deed from Bell to Peterson that proximately caused the injury. We do not see any merit in this contention. In the first place, the mere possession by Bell of the certificate from the notary Mahon, that Francis M. Rose had appeared before him and executed the deed to Edward D. Bell, and that he knew Mr. Rose to be the person described in the deed, was one of the strongest credentials producible to establish his identity and responsibility in the eyes of Frankberg and Peterson; and, in the second place, the deed from Rose to Bell, had it been genuine, together with a deed from Bell to plaintiff, would have passed perfect title regardless of the fact that Bell was an assumed name. Frankberg knew that the grantee in the first deed was the same and identical person who executed the second as grantor. It seems clear to us, therefore, that the action of defendant in certifying to a forged deed was the proximate cause of plaintiff's injury, and defendant must respond to him in damages unless excused by the contributory negligence of plaintiff himself.

(2) This brings us to the second proposition; namely, was Peterson guilty of such negligence that he should not be allowed to recover in this action? This question is closely allied with paragraph 1. Ordinarily the question of contributory negligence is for the jury unless the facts are not in dispute, in which case it becomes a question of law for the court. Defendant himself has invoked the ruling of the court upon this question by his motion for a directed verdict. In passing upon this question the trial court had before him the undisputed evidence in the case, from which it appeared that the plaintiff was a bus driver, presumably without much legal education or experience. The newspapers of the city had announced the arrival of a new real estate agent, who had taken a suite of offices in one of the principal buildings of the town. He had taken apartments at the hotel where plaintiff was himself staying. He had been introduced to plaintiff, by reputable business men, under the name of Bell. When the subject of the land

sale was brought up, plaintiff went to an attorney, told him the facts, and asked for an examination of the title, and was informed by the attorney that everything was all right and the title in Francis M. Rose, as claimed by Bell. When Bell returned from Fargo with the deed, he took the same to his attorney to have the transfer made and to protect him in his rights. The attorney examined the original records and the forged deed, which bore defendant's certificate, and even took the precaution to telephone to the register of deeds at the moment of paying over the money, to ascertain if any other instrument had been presented covering the tract of land. True, in the Rose deed, Bell's residence was described as St. Louis county, while in the deed executed from Bell to Peterson his residence was given as Otter Tail county, but Bell had evidently come from somewhere and had just located in Otter Tail county. St. Louis county contains the city of Duluth, and it would be possible for Bell to have resided there for considerable time without getting a commercial standing or even being registered in the directories.

We believe the trial court was justified in finding, as he did, that plaintiff had acted as an ordinarily prudent man would have acted under all the circumstances of the case, and was therefore not guilty of any negligence which contributed to his own injury. Appellant cites the case of *Oakland Bank v. Murfey*, 68 Cal. 455, 9 Pac. 843, but it differs very materially in its facts from the case at bar. In the California case, Harmon presented himself to the bank, with a forged deed very similar to the one in this case, but the bank officials made no inquiry as to his identity, and had no reason to rely upon his plain statement that he was Henry Harmon. Under those circumstances it was held that the bank was guilty of contributory negligence, but we doubt if the California court would have reached that conclusion had Harmon located in the town, opened up real estate office, and been introduced to the bank officials by reputable business men in whom they had a right to rely. In fact, in the case of *Homan v. Wayer*, 9 Cal. App. 123, 98 Pac. 80, the same state refused to hold plaintiff guilty of contributory negligence, because, as they say, there were no suspicious circumstances which would put an ordinarily prudent man upon his guard. See also: *Joost v. Craig*, 131 Cal. 504, 82 Am. St. Rep. 374, 63 Pac. 840; *Kleinpeter v. Castro*, 11 Cal. App. 83, 103 Pac. 1090:

State ex rel. Heitkamp v. Ryland, 163 Mo. 280, 63 S. W. 819; People use of Munson v. Bartels, 138 Ill. 322, 27 N. E. 1091, 152 Ill. 557, 38 N. E. 898; Samuels v. Brand, 119 Ky. 13, 82 S. W. 977; Wilson v. Gribben, 152 Iowa, 379, 132 N. W. 849; State use of Kleinsorge v. Meyer, 2 Mo. App. 413.

(3) Appellant contends that the court erred in taking from the jury the question of contributory negligence. Several answers can be made to this objection. First, there was absolutely no dispute as to the facts. Plaintiff and his attorney Frankberg were the only witnesses upon this question, and they were not contradicted in any particular. The testimony being certain, its legal effect was readily ascertainable by the court. Second, the defendant himself had moved the court to take this identical question from the jury and decide it as a matter of law. It seems inconsistent that he can now insist that it should have been submitted to the jury. See paragraph 6 of Citizens' Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266, where the matter is exhaustively treated. Under the well-established rule therein announced, the ruling of the trial court was proper.

Other assignments in appellant's brief are fully answered by the foregoing principles. The action of the trial court was correct and is in all things affirmed.

F. A. PATRICK & CO., a Corporation, v. EDWIN H. KNAPP and Emil O. Fonkalsrud, Copartners as Knapp & Fonkalsrud, Defendants, and A. Hilliard, Intervener.

(145 N. W. 598.)

The owner of a certain business block assigned the future rents to one H. Later plaintiff obtained judgment against the owner of the premises and sold the same upon execution. This action is to determine the rights to the rents subsequent to the sale. H. was also the holder of a prior mortgage under which he sold the premises six months after the said execution sale. The rights of the mortgagee to the rents after his sale are also in dispute.

Execution — sale under — purchasers — become owners of premises — redemption — title — dates from sale — rents — owner's interest extinguishes — assignment of rents by owner — extinguished.

1. Upon the sale under the execution, the purchasers became the owners of the premises, subject to the mortgage of H., and subject to the various rights of redemption. In the absence of a redemption the purchaser's title dates from the sale. Under § 7148, Rev. Codes 1905, such purchaser is entitled to the rents from the time of the sale. As the owner's interest in the land was extinguished by the sale, her assignment of the rents given to H. was also extinguished, and the purchaser was entitled to the same until his interest in turn was extinguished by sale upon the mortgage held by H. Authorities collected and digested.

Mortgage — sale under — rents.

2. After the sale to H. under his mortgage, he in turn was entitled to receive the rents.

Opinion filed February 11, 1914.

Appeal from the District Court of Stark County, *Crawford, J.*
Judgment modified and affirmed.

Thomas H. Pugh, for appellant.

A prior unrecorded lien against the land in question, of which the judgment creditor had no knowledge or notice, will be postponed to the lien of the judgment. Black, Judgm. 2d ed. § 446, and cases cited; Tiffany, Real Prop. p. 1319; Perkins v. Adams, 16 Colo. App. 96, 63 Pac. 792; Teller v. Hill, 18 Colo. App. 509, 72 Pac. 811; Berryhill v. Smith, 59 Minn. 285, 61 N. W. 144; Hall v. Sauntry, 72 Minn. 420, 71 Am. St. Rep. 497, 75 N. W. 720; Lewis v. Atherton, 5 Okla. 90, 47 Pac. 1070; Bank of Indiana v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390; Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Elderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390; Ildvedsen v. First State Bank, 24 N. D. 227, 139 N. W. 105.

The equities of the intervener will be postponed to the claim of the plaintiff. Ildvedson v. First State Bank, 24 N. D. 227, 139 N. W. 105; Whithed v. St. Anthony & D. Elevator Co. 9 N. D. 227, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238; Harris v. Reynolds, 13 Cal. 515, 73 Am. Dec. 600; Rev. Codes 1905, § 7148.

The law regards the purchaser as the owner of the land from the time of sale and during the period allowed to redeem. Page v. Rogers,

31 Cal. 302; *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 725; *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187, 32 Pac. 246; *Whithed v. St. Anthony & D. Elevator Co.* 9 N. D. 227, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238; *Clement v. Shipley*, 2 N. D. 430, 51 N. W. 414.

The appellate court will review the evidence to determine whether or not the facts found by the trial court are correct. *Bessie v. Northern P. R. Co.* 14 N. D. 614, 105 N. W. 936.

W. F. Burnett, for respondents and intervener.

Rent issues out of the thing granted, and is no part of the thing or land itself. *Payn v. Beal*, 4 Denio, 405; 7 Words & Phrases, Rents; *Farmers' Trust Co. v. Prudden*, 84 Minn. 126, 86 N. W. 887.

The instrument in question was not required to be recorded to render it effective. *Farmers' Trust Co. v. Prudden*, *supra*; *Harris v. Taylor*, 35 App. Div. 462, 54 N. Y. Supp. 864; *Riley v. Sexton*, 32 Hun, 245; *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133; *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638.

The rule of *caveat emptor* applies in execution and foreclosure sales. *Louisville & N. R. Co. v. Illinois C. R. Co.* 174 Ill. 448, 51 N. E. 824; 7 Ballard, Real Prop. § 572; *Griffith v. Burlingame*, 18 Wash. 429, 51 Pac. 1059.

The rents assigned by a judgment debtor before judgment was rendered, under which the sale was made, belong to the assignee. *Abel v. Wilder*, 7 B. Mon. 530; *Fullerton v. Shauffer*, 12 Pa. 220; *Johnson v. Cook*, 96 Mo. App. 442, 70 S. W. 526.

BURKE, J. June 12, 1905, Annis Brown was the owner of a business block in the city of Dickinson, North Dakota, and upon that date she executed a mortgage upon the premises to one Hilliard to secure the sum of \$5,000. August 1, 1908, she obtained a further loan from Hilliard in the sum of \$2,000, for the purpose of placing the building in repair, and as security assigned to him "the rents and profits of said described premises until the full amount of said note shall be paid." This assignment was never placed on record with the register of deeds of Stark county, but under its terms Hilliard assumed the management of the premises, rented the same, collected the rent, and applied the proceeds upon his \$2,000 note. September 11, 1908, plaintiffs obtained

judgment against Annis Brown, caused execution to issue, and the premises were sold on the 31st day of December, 1910, to satisfy the amount of said judgment, plaintiffs being the purchasers at such sale. Said sale was thereafter duly confirmed by the court. This action was thereupon commenced by the plaintiffs to recover rents and profits of the premises from Knapp, who was the tenant in possession. Hilliard intervened in said suit, and shortly thereafter caused foreclosure proceedings upon his \$5,000 mortgage, which resulted in a sale of the premises to him on July 1, 1911. No redemption was made from either sale.

Two separate questions are presented to us for decision. First, who was entitled to the rents from December 31, 1910, until July 1, 1911; and second, to whom did the said rents belong after that date.

(1) Until December 31, 1910, Annis Brown was the owner of the premises in question, and had a right to the rents and profits, or might assign or hypothecate the same. It is undisputed that she did so assign the rents and profits to Hilliard. Upon that date all her interest in the said premises were sold upon execution sale to the plaintiffs, Patrick & Company. They became the owners of the premises subject to the mortgage of Hilliard, and subject to the various rights of redemption held by Annis Brown and her creditors. See *Clement v. Shipley*, 2 N. D. 430, 51 N. W. 414; *Whithed v. St. Anthony & D. Elevator Co.* 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238; *Page v. Rogers*, 31 Cal. 294, from which we quote: "The legal title remains in the judgment debtor, with the further right in him and his creditors having subsequent liens, to defeat the operation of a sale already made during a period of six months, after which the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere dry, naked, legal title remains in the judgment debtor, with authority in the sheriff to divest it by executing a deed to the purchaser. Even during the period which elapses between the sale and expiration of the time for redemption, the statute regards the purchaser as the owner in equity and gives him the rents and profits; . . . in short, it gives him the entire beneficial interest in the property except the actual possession." See also *Kline v. Chase*, 17 Cal. 596; *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 486, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453.

Section 7148, Rev. Codes 1905, reads: "The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. . . ."

Thus, upon the sale of Annis Brown's interest in the land, we find her divested of the equitable title and the right to collect rents and profits, which have been transferred by the sale to plaintiffs herein. It must necessarily follow that any prior assignment or hypothecation of those rents must fail with the passing of her title. If she could not collect the same herself, she certainly had no right to collect them through an assignee. Upon said date Patrick & Company stepped into her shoes and became the owners of the property as truly as she had been, subject only to the prior encumbrances held by Hilliard and the right of redemption by other lien holders. No redemption having been made from the sale, they were not required to account for the rents which they received. The parties would evidently be in the same position as though Patrick & Company had, on the 31st day of December, 1910, purchased the premises from Mrs. Brown. In view of the fact that no mortgage foreclosure proceedings had been instituted at that time, and that the assignment of the lease was not of record, and had not been brought to the attention of Patrick & Company, would they not be entitled to the rents until a sale of the premises under the mortgage? Section 7148, *supra*, makes no distinction between purchasers at execution and mortgage foreclosure sales, and the case of *Gaynor v. Blewett*, 82 Wis. 313, 33 Am. St. Rep. 47, 52 N. W. 313, treats the proposition in this wise: "He [Hilliard in this case] could not get any better right than his lessor, the mortgagor defendant [Mrs. Brown—in this case] had. It matters not that he did not know, as he says, that there was any intention to apply for the appointment of a receiver. He knew, or is chargeable with knowledge, that the court might make such an appointment . . . so far as the possession of the premises is concerned; the appointment of the receiver had the effect of an equitable ejectment. Were this otherwise the beneficial results of a receivership could be easily defeated by giving a lease of the premises in question long enough to last during the probable duration of the litigation, and by collecting the rent in advance. The receiver, on his

appointment, became entitled, as against the appellants, to the possession and use of the premises, and his rights are in no way affected by the provisions of the lease and payment in advance of rent." In the Wisconsin case, sale had been made on foreclosure and a receiver appointed to collect the rents, which is the only difference between that and the case at bar, excepting that the rents in that case had been paid for one year in advance to the assignee, who corresponds to Mr. Hilliard in this case. In the case of *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187, 32 Pac. 246, the tenant had paid the rents in advance for the whole term of his lease. Foreclosure had been begun and the mortgagee attempted to collect the rents from the tenant. We quote: "The defendant contends that as he leased the land before it was purchased by the plaintiff at the foreclosure sale, and paid to the then owners the rent in advance for the whole term, in accordance with the agreement contained in the lease; that he is not liable to the plaintiff. . . . The plaintiff having become the purchaser of the land under a decree foreclosing a mortgage made long before the date of defendant's lease, and of which mortgage the defendant had notice, it is no defense to this action that defendant paid the rent in advance. The lessor, to whose title plaintiff has succeeded, was not entitled to the rent accruing, or to the value of the use and occupation of the property, subsequent to the sale under the judgment of foreclosure, unless such lessor effected a redemption from the sale; and the payment of rent for the period extending beyond the date of such sale was made by defendant at his peril. This necessarily results from the well-established rule that a subsequent grant or lease of mortgaged premises is subject to the prior mortgage, if the purchaser or lessee had either actual or constructive notice of such mortgage. If the law were otherwise, it would be in the power of the mortgagor to materially diminish the value of the mortgaged property as security for the debt for which the mortgage was given, by simply leasing it for a long period and collecting the rent in advance, or by leasing it for such period for a nominal rent. It was held in the case of *McDevitt v. Sullivan*, 8 Cal. 593, in accordance with the views we have here expressed, that where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant, that the purchaser under the mortgage sale can require the tenant to pay the rent over again." Of course, the above

cases differ from the one at bar in that the purchaser bought at mortgage sale in place of execution sale, but the principle is the same.

In *Townsend v. Isenberger*, 45 Iowa, 670, the facts were very similar to the case at bar, excepting that the property was farm land and the owner had assigned his share of the crop. The supreme court of Iowa held that the "rent reserved by lease, and not accrued, passes by a conveyance of the land to the grantee. *Abercrombie v. Redpath*, 1 Iowa, 111; *Van Driel v. Rosierz*, 26 Iowa, 575. A purchaser under an execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed. *Bank of Pennsylvania v. Wise*, 3 Watts, 394; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364."

In *Smith v. Newman*, 140 Ky. 80, 130 S. W. 953, Ann. Cas. 1912B, 395, it is said: "It is a well-settled general rule in this state that the purchaser . . . is entitled to the possession of the property purchased when the sale is confirmed, and consequently entitled to the rent from that date. *Taliaferro v. Gay*, 78 Ky. 496; *Ball v. First Nat. Bank*, 80 Ky. 507; *Norris v. Williams*, 139 Ky. 422, 65 S. W. 439. But, to this rule there is the exception that if the purchaser buys the property with the understanding that he is not to get possession until a specified time after the sale, he will not be entitled to it before the time designated."

In *Jashenosky v. Volrath*, 59 Ohio St. 540, 69 Am. St. Rep. 786, 53 N. E. 46, it is said: "The equity of the rule is manifest, because the purchaser cannot escape from the sale because he may think it disadvantageous to him, and he is required to pay interest from the date of sale on so much of the purchase price as he has not actually paid. That the right to the immediate rents passes to the purchaser as one of the results of confirmation has been held in numerous cases." See also *Taylor v. Cooper*, 10 Leigh, 317, 34 Am. Dec. 737.

At vol. 24 Cyc. page 64, the text says: "When the sale is duly confirmed, the purchaser is generally held entitled to the rents and profits from the time of the sale. Rent reserved, but not accrued, under a lease, passes with the conveyance of the premises, and a purchaser thereof at judicial sale becomes entitled to such rent. Where rent has been paid in advance for a term which does not expire until after the completion of the purchase, the purchaser is entitled to a *pro rata* portion thereof."

We must admit, however, that the case of *Griffith v. Burlingame*, 18 Wash. 429, 51 Pac. 1059, holds contrary to our conclusion upon almost identically the same statute. They say: "But it has never been the understanding of this court, and is not now, that the statute quoted was intended to affect anything more than the respective rights of the purchaser and the judgment debtor during the period of redemption; and certainly the purchaser, under the statute, and under all authority, could obtain no more than the interest of the judgment debtor in the property purchased; and under the facts proven in this case, the Freemont Milling Company had no interest either in the possession or in the lease, for it had been assigned to the intervener long prior to the execution sale. There was no lien upon this property at the time of the assignment, and there was nothing to prevent the owners from alienating it, or alienating any interest not subject to the lien of the mortgage."

The Washington court seems to make a distinction between a purchaser at a mortgage sale and one at a judicial sale, and they lay emphasis upon the fact that the purchaser obtains nothing more than the interest of the judgment debtor. It is quite evident that their statute upon this phase of the question differs from our § 5038, Rev. Codes 1905, which places judgments on the same plane with deeds, and gives to the purchaser not only the real interest of the judgment debtor, but the interest which is apparent upon the face of the record.

Besides, we do not think there is any difference under our statute between the rights of a purchaser at a mortgage foreclosure sale and one at a judicial sale. If Mrs. Brown could assign the rents as against Patrick & Company, could she not have assigned the same against the mortgagee, Hilliard, and thus have prevented him from collecting the same after the sale upon his mortgage, July 1, 1911? We are satisfied that the Washington court is mistaken in this fundamental principle, to wit, that the present owner of a tract of land can assign the rents to accrue in the future so as to be binding upon a future purchaser without reservation, and who has no knowledge of the assignment.

During this time Hilliard had a first mortgage upon the premises which he elected to foreclose, and the sale was made July 1, 1911, some six months after the execution sale to Patrick & Company. He had lost his rights to the rents under the assignment from Annis Brown, and

he had not acquired any rights under his foreclosure until the date of the sale. We thus conclude that during those six months plaintiff was entitled to collect the rents from the tenants in possession, and in this respect the finding of the trial court is erroneous and is reversed.

(2) Upon the sale to Hilliard under his mortgage foreclosure, he in turn became the purchaser in the contemplation of § 7148, Rev. Codes 1905, and in turn was entitled to receive the rents and profits from the tenants in possession as against Mrs. Brown and her successors in interest, Patrick & Company, subject only to the right of redemptioners to call upon him to account for the same in case they should redeem from his sale. As no redemption was made, it follows that he was entitled absolutely to the said rents on and after July 1, 1911. In this respect the finding of the trial court is correct and is accordingly affirmed.

In view of the disposition of this case as aforesaid, we deem it proper that neither party recover costs upon this appeal. The judgment of the trial court will be modified to meet the views expressed in this opinion.

W. D. GILE v. INTERSTATE MOTOR CAR COMPANY, a
Corporation.

(— L.R.A.(N.S.) —, 145 N. W. 732.)

Contract — sale of automobiles — specified territory — specified time — specified price — deposit money — failure to perform — action to recover deposit money — right denied.

1. Defendant, a distributor of Interstate automobiles for the state of North Dakota, entered into a written contract with plaintiff by which the latter agreed to purchase and pay for at least 50 cars at specified dates during the life of the contract, and to deposit with defendant the sum of \$1,250, being \$25, on each car, to be applied by defendant on the purchase price of each when sold. In consideration thereof defendant allotted to plaintiff during the life of the contract, nearly one year, the exclusive right to solicit purchasers of and to sell such cars in ten designated counties of the state, and obligated itself to furnish cars to plaintiff, when ordered, at certain specified discounts from list prices. Plaintiff promised to diligently and faithfully advertise such cars in and to work such territory during the life of such contract, and to

do certain other things tending to promote and to effectuate the objects of the contract. Plaintiff advanced to defendant the deposit aforesaid, and entered upon the performance of the agreement. During the entire life of the contract both parties, in good faith, attempted to fulfil the same. Defendant was ready, able, and willing to perform on its part, but plaintiff did not succeed in making any sales during the entire period, and as a consequence was unable to and did not take and pay for any of such cars. Shortly after the termination of such contract by lapse of the period designated therein for its existence, plaintiff brought this action to recover such deposit as for money had and received by defendant to his use, claiming a right to the repayment thereof upon the ground that the consideration had wholly failed.

Held. for reasons stated in the opinion, that he cannot recover.

Implied promise — repayment — equity — good conscience.

2. In order to maintain such action it is incumbent on plaintiff to establish facts from which the law raises an implied promise on defendant's part to repay such money, and such a promise will never be implied except where it appears that in equity and good conscience defendant ought not to be permitted to retain the same.

Contract — mutuality — executory — rights of parties — measured by the contract.

3. Whether the contract lacked mutuality and was therefore voidable and unenforceable while it remained wholly executory is not controlling. The contract was not illegal or unlawful, and the parties having acted under it during the entire period of its existence, it cannot, so far as executed, be questioned, and it must, to such extent, control and measure the rights of the respective parties.

Stipulation — contract — liquidated damages — not a penalty — valid.

4. The stipulation in the contract authorizing the retention by defendant of such deposit as liquidated damages for plaintiff's breach thereof, *held*, not in the nature of a penalty, because from the nature of the case it would be extremely difficult, if not impossible, to fix the actual damages.

Breach of contract — performance — deposit — money had and received.

5. Plaintiff having breached the contract while defendant performed the same, as far as plaintiff permitted it to do so, the former cannot recover such deposit as for money had and received.

Damages — defense — want of equity.

6. Defendant, by his answer and proof, did not seek to recover damages against the plaintiff under the contract, but he merely plead and proved such actual damages as far as they were susceptible of proof, as defensive matter tending to show a want of equity in plaintiff's claim.

Opinion filed February 13, 1914.

Appeal from District Court, Nelson County, *C. F. Templeton, J.*
From an order granting a new trial, defendant appeals.

Reversed.

Scott Rex, for appellant.

The action for money had and received only lies in those cases where the defendant has received money or its equivalent which in equity and good conscience belongs to the plaintiff. *Krump v. First State Bank*, 8 N. D. 75, 76 N. W. 995; *Logan v. Freerks*, 14 N. D. 127, 103 N. W. 426; *Martin v. Toyer*, 19 N. D. 504, 125 N. W. 1027; *Siems v. Pierre Sav. Bank*, 7 S. D. 338, 64 N. W. 167; 15 Am. & Eng. Enc. Law, 1096; 27 Cyc. 849.

Money paid in the fulfilment of a valid contract cannot be recovered back unless the contract has been rescinded by consent, or by failure of defendant to perform. 30 Cyc. 1322; *Chemical Nat. Bank v. World's Columbian Exposition*, 170 Ill. 82, 48 N. E. 331; *Fox v. Monahan*, 8 Cal. App. 707, 97 Pac. 765; *Todd v. Bettingen*, 109 Minn. 493, — L.R.A.(N.S.) —, 124 N. W. 443; *Moses v. MacFerlan*, 2 Burr. 1005, 1 W. Bl. 219; *Slevin v. Police Fund Comrs.* 123 Cal. 130, 44 L.R.A. 114, 55 Pac. 785.

A party who has breached the contract has no right to recover back the payments made by him. *Clark v. American Development & Min. Co.* 28 Mont. 468, 72 Pac. 978; *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037; *Way v. Johnson*, 5 S. D. 237, 58 N. W. 552; *Maloy v. Muir*, 62 Neb. 80, 86 N. W. 916; *York v. Washburn*, 118 Fed. 316; *Warvelle, Vend. & P.* § 926; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; *Downey v. Riggs*, 102 Iowa, 88, 70 N. W. 1091; *McManus v. Blackmarr*, 47 Minn. 331, 50 N. W. 230; *Lawrence v. Miller*, 86 N. Y. 131; *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28; *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Chemical Nat. Bank v. World's Columbian Exposition*, 170 Ill. 82, 48 N. E. 331.

The contract in question is an executory one for the purchase of cars. Defendant never at any time sold plaintiff any cars. Defendant was at no time in default. *Bell v. Hatfield*, 121 Ky. 560, 89 S. W. 544, 2 L.R.A.(N.S.) 529, and case note; *Krebs Hop Co. v. Livesley*, 55 Or. 227, 104 Pac. 3; 35 Cyc. 584.

The seller of goods is entitled to such damages as will put him in the

same position as though he had been permitted to complete the contract, which usually is the difference between the contract price and what it would have cost him to perform. *American Contr. Co. v. Bullen Bridge Co.* 29 Or. 549, 46 Pac. 138; *Rochm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; *Canfield v. Orange*, 13 N. D. 622, 102 N. W. 313; *Young v. Metcalf Land Co.* 18 N. D. 441, 122 N. W. 1101.

Where the sum stipulated in the contract as damages is *less* than the *actual* damages, it cannot be held to be a penalty. *Krausse v. Greenfield*, 61 Or. 502, 123 Pac. 392.

Losses which are the necessary and ultimate result of plaintiff's breach of the contract are proper elements of general damages, and need not be specially pleaded. 13 Cyc. 175; 5 Enc. Pl. & Pr. 740.

Assuming that the original answer was defective, it would have been an abuse of discretion had the court refused to permit the amendment offered. *Martin v. Luger Furniture Co.* 8 N. D. 220, 77 N. W. 1003; *Welch v. Northern P. R. Co.* 14 N. D. 19, 103 N. W. 396; *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197; *Webb v. Wegley*, 19 N. D. 606, 125 N. W. 562.

Frich & Kelly, for respondent.

The contract involved in this case is a conditional sale. *Poirier Mfg. Co. v. Kitts*, 18 N. D. 557, 120 N. W. 558; *Morrison Mfg. Co. v. Fargo Storage & Transfer Co.* 16 N. D. 256, 113 N. W. 605.

After September 1, 1911, respondent could not require delivery of the cars under the contract, nor could appellant make delivery and compel acceptance and payment. *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Sweetzer v. Mellick*, 4 Idaho, 201, 38 Pac. 403.

The action for money had and received is equitable in its nature. It does not depend on an express promise, but on the fact of the *receipt of the money* by one from another, through oppression, imposition, extortion, or deceit, mistake of fact, or without consideration, or on a consideration that has failed, and from which the law *implies* a *promise to repay*. *Ashton v. Shepherd*, 120 Ind. 69, 22 N. E. 98; *Richter v. Union Land & Stock Co.* 129 Cal. 367, 62 Pac. 39; *Tilford v. Roberts*, 8 Ind. 254; *Davis v. Marston*, 5 Mass. 199; *Dill v. Wareham*, 7 Met. 438; *Morrison v. Larrison*, 1 Marv. (Del.) 211, 40 Atl. 1107; *Field v. Banks*, 177 Mass. 36, 58 N. E. 155; *Hicks v. Steel*,

126 Mich. 408, 85 N. W. 1121; *Luce v. New Orange Industrial Asso.* 68 N. J. L. 31, 52 Atl. 306; *Bier v. Bash*, 186 N. Y. 565, 79 N. E. 1101; *Randlet v. Herren*, 20 N. H. 102; *Warder, B. & G. Co. v. Myers*, 70 Neb. 15, 96 N. W. 992; *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. 686; *Dring v. St. Lawrence Twp.* 23 S. D. 624, 122 N. W. 664; *Scheer v. Clinton Falls Nursery Co.* 20 N. D. 1, 124 N. W. 1115.

No objection to the *form* of this action was made in the lower court. *Mahon v. Fansett*, 17 N. D. 104, 115 N. W. 79; *Northern Shoe Co. v. Cecka*, 22 N. D. 631, 135 N. W. 177.

The deposit was merely as security for the performance of the contract,—that the purchaser would make diligent efforts to canvass the territory and sell the cars. *Carson v. Arvantes*, 10 Colo. App. 382, 50 Pac. 1080, 27 Colo. 77, 59 Pac. 737; 1 Sedgw. Damages, 410; *Traub-Dittmar Constr. Co. v. Hartman*, 61 Misc. 173, 112 N. Y. Supp. 919, 133 App. Div. 889, 117 N. Y. Supp. 1149; *Home Land & Cattle Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 822; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749.

Actual damages in this case, if any existed, were not difficult to fix, and this issue does not come under § 5370, Revised Codes 1905. *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583; *Mansur-Tebbetts Implement Co. v. Willet*, 10 Okla. 383, 61 Pac. 1066; *Condon v. Kemper*, 47 Kan. 126, 13 L.R.A. 671, 27 Pac. 829; *Wilkes v. Bierne*, 68 W. Va. 82, 31 L.R.A.(N.S.) 937, 69 S. E. 366; *Squires v. Elwood*, 33 Neb. 126, 49 N. W. 939; *J. I. Case Threshing Mach. Co. v. Frank*, 105 Minn. 39, 117 N. W. 229.

The appellant by his amended answer recognizes the contract as a sale, and has made an election of his remedy, and is bound by it. *Tiedeman, Sales*, §§ 331, et seq.; *Blackburn, Sales*, chap. III, ** 445, et seq.; 35 Cyc. title "Sales" subd. VIII, Remedies of Seller.

Appellant has suffered no actual damages and has no claim on the deposit money. *McCormick Harvesting Mach. Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10; *Mead v. Rat Portage Lumber Co.* 93 Minn. 343, 101 N. W. 299; *D. M. Osborne & Co. v. Martin*, 4 S. D. 297, 56 N. W. 905; *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837; *Canham v. Plano Mfg. Co.* 3 N. D. 229, 55 N. W. 583; 35 Cyc. 531.

The rule is the same where damages for breach, and not the price of the goods sold, are sought to be recovered by the seller. *Thick v. Detroit, U. & R. R. Co.* 137 Mich. 708, 109 Am. St. Rep. 694, 101 N. W. 64; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Sweetser v. Mellick*, 4 Idaho, 201, 38 Pac. 403; *Gardner v. Caylor*, 24 Ind. App. 521, 56 N. E. 134; *Offutt v. Wells*, 42 Ala. 199; *Newbery v. Furnival*, 56 N. Y. 638; *Neis v. Yocum*, 9 Sawy. 24, 16 Fed. 168; *Parish v. United States*, 8 Wall. 489, 19 L. ed. 472; *Smoot's Case*, 15 Wall. 36, 21 L. ed. 107; *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. Rep. 311; 35 Cyc. 534, and notes; *Fountain City Drill Co. v. Lindquist*, 22 S. D. 7, 114 N. W. 1098; *Scheer v. Clinton Falls Nursery Co.* 20 N. D. 1, 124 N. W. 1115.

FISK, J. On October 8, 1910, the parties entered into the following written agreement:

This agreement, made this 8th day of October, A. D. 1910, at Lakota, N. D., between the Interstate Motor Car Company, party of the first part (hereinafter known as the distributors), and W. D. Gile, party of the second part (hereinafter known as the dealer); witnesseth:

(1) That the distributors hereby grant unto said dealer the right to sell Interstate cars in the following described territory, to wit: Williams, McKenzie, Billings, Bowman, Burke, Montraile, Dunn, Stark, Hettinger, and Adams counties. (The Interstate Motor Car Company reserves the right to cancel any of the above counties if no agency appointed on or before June 1, 1911, by the dealer.)

(2) The distributors hereby agree to sell to the dealer Interstate cars with standard catalogue equipment at a discount of 20 per cent from list price thereof. The price of Interstate cars—in standard 'touring,' 'roadster,' or 'demi-tonneau' types, with full lamp equipment, magneto, horn, and tools, shall be \$1,750 f.o.b. factory at Muncie, Indiana.

(3) The distributors reserve the right to change all prices and discounts mentioned in this contract, upon two weeks' notice in writing, duly mailed to the dealer.

(4) No order for automobiles, automobile parts, or attachments shall be binding upon said distributors unless said order shall clearly specify

kinds and styles, dates of shipment, etc., and unless it is accepted by the distributor at least thirty days prior to date of delivery, and all such orders and acceptances shall be in writing and subject to delays caused by strikes, fires, or other causes beyond manufacturer's control.

(5) The failure of the distributors to enforce at any time any of the provisions of this agreement, or to exercise any option which is herein provided, or to require at any time performance by the dealer of any of the provisions hereof, shall in no way be construed to be a waiver thereof, nor in any way affect the validity of this contract or any part thereof, or the right of the distributors to hereafter enforce the same.

(6) The distributors shall not be liable for any failure of performance on its part when said failure of performance shall be due to fire, strike, insurrection, or any other cause beyond its control.

(7) It is expressly understood and agreed that the title to each and every automobile, and to all automobile parts furnished to said dealer, under the terms of this agreement, shall be and remain in the distributors' name until same is paid for in full, in cash.

(8) It is further agreed that the distributors shall not be liable to the dealer for any loss or damages to automobiles or other goods furnished under this contract, while the same are in the custody and possession of any railroad, express company, or other common carrier in transit.

(9) All claims on account of material must be made by the dealer within sixty days after the delivery of automobiles, etc., to the dealer's customers, and upon any such material being submitted to the manufacturer properly tagged, giving the motor number of the automobile from which the same was taken, the name and address of the owner, and the date of sale when new, and the date when said part was taken from said automobile, or gratuitous exchange of part was made, and such other information as may from time to time be prescribed by the manufacturer; manufacturer agrees to replace such parts gratis, if, upon examination of the same it shall, in the opinion of the manufacturer, be found to be defective in workmanship and material; the freight or express charges on said part so returned to the manufacturer for credit or replacement must in all cases be prepaid by the dealer; and all claims on account of defective tires, rims, coils, radiators, and other equipment not manufactured by the Interstate Automobile Com-

pany, must be made by said dealer to the respective manufacturers of such tires, rims, coils, radiators, and other equipment.

(10) The dealer hereby orders and agrees to take and pay for not less than 50 Interstate cars of the types and on the dates as hereinafter indicated.

Touring Car.

Jan. 1911	Three
Feb. 1911	Three
Mar. 1911	Three
Apr. 1911	Six
May 1911	Nine
June 1911	Twelve
July 1911	Eight
Sep. 1911	
Oct. 1911	
Nov. 1910	Three
Dec. 1910	Three

(11) The dealer has deposited with the distributors the sum of \$1,-250 to apply at the rate of \$25 per car on the cars ordered as above; said sum will be credited by the distributors to the dealer, and will be repaid as cars are delivered and paid for, at the same rate, except that any or all of said deposit may, at the option of the distributor, be credited against any parts or open account due the distributors from the dealer, and the balance, if any, will be credited *pro rata*, on each car taken. The balance of the price of each, over and above the amount prepaid and credited against it as aforesaid, shall be paid at the time of shipment or on presentation of sight draft with bill of lading attached.

(12) The dealer further agrees:

(a) That he will maintain at all times the manufacturer's list price for automobiles and parts, and that he will not by rebates, allowances, donations, or by other means, evade the spirit of this clause.

(b) That at the end of each week the dealer will report to the distributors the names and addresses of all purchasers of Interstate cars, together with factory number of same.

(c) That he will faithfully represent and advertise such automobiles; make all reasonable efforts to promote and increase the sales

thereof; keep in stock at least one of Interstate manufacture, for the sole purpose of demonstrating and exhibiting to prospective purchasers, and maintain the same in good order and repair.

(d) That he will respond promptly to all inquiries respecting the purchase of said automobiles; keep the distributors fully informed as to the number of inquiries for, and sales of automobiles within said territory, and any other matters affecting the interests of the distributors in connection with this agreement; sell all vehicles covered by this agreement and all their parts and attachments at the selling prices, according to lists thereof to be furnished by said distributors; that he will do nothing that will in any way infringe, impeach, or lessen the value of any of the patents under which the manufacturer makes such vehicles; and will not sell nor offer for sale, directly or indirectly, any new automobiles or motor cars, except the following lines, the sale of which, by the dealer, is hereby approved by the distributors.

(g) That if this contract to take and pay for cars is unfulfilled by the dealer, the distributors may retain the amount of any deposits remaining to his credit, as liquidated damages for the breach thereof.

(h) That all parts ordered shall be shipped C. O. D.

(i) That he will not materially change any car manufactured by the manufacturer, nor assign this contract or any rights hereunder, without the written consent of the distributors.

(j) That he will not sell any new car manufactured by the manufacturer of Interstate cars, or any parts or accessories thereof, in any territory other than that above described; except that, should any person or persons residing elsewhere come unsolicited to the dealer's place of business, sales may be made for the delivery of cars off the floor; provided, however, that should any reduction in price, rebate, donation in the form of freight charges, extra equipment, or other special inducement, expressed or implied, be offered to effect such sale, the same shall be construed as a violation of the spirit of this contract, and the distributors may, after hearing both sides, arbitrarily so decide and require the dealer to pay the full or any part of the discount to the dealer in whose territory the buyer may have his legal residence.

(13) It is mutually understood and agreed:

(a) That this contract shall be interpreted and construed according to the laws of the state of North Dakota.

(b) That this contract shall expire by its own limitation on September 1, 1911, or may be canceled by either party upon thirty days' written notice, given to the other by registered letter, and such cancellation of this contract shall operate as a cancellation of all orders for automobiles, automobile parts, or attachments which may have been received from said dealer and which have not been shipped prior to the date when such cancellation takes effect, but shall not cancel any standing accounts for automobiles, parts, etc.

(c) That after the termination of this agreement for cause or as above prescribed, the continuance of the sale of such automobiles or the referring of inquiring by the distributors to the dealer, shall not be construed as a renewal of this agreement for any specified period of time, but all orders accepted by the distributors and all sales made by the dealer after such termination of this contract shall be governed by the terms and conditions thereof.

This agreement, to be valid, must bear the signatures of the president and secretary of the Interstate Motor Car Company.

In witness whereof, the said parties hereto have signed this agreement the day and year first above written.

Interstate Motor Car Co.,
(The Distributers.)

Geo. L. Barrett, President.
_____, Secretary.

W. D. Gile
(The Dealer.)

Pursuant to the terms of such contract, plaintiff deposited with defendant the sum of \$1,250. Whether such deposit was in cash or by the transfer to defendant of certain personal property is not here material. That the contract in this respect was complied with by plaintiff is conceded. It is also conceded that plaintiff during the entire life of such contract exercised, unmolested, the right conferred on him by such instrument of canvassing the territory therein, consisting of ten counties in the northwestern portion of this state, for prospective purchasers of Interstate cars, and that defendant in good faith lent him friendly assistance in such work. It is also undisputed that plaintiff failed to secure a single order, and that as a consequence he not only

failed to order and pay for 50 cars which he agreed to do by the terms of such contract, but he did not order or pay for any of such cars whatever. It cannot be questioned but that such contract was fairly and in good faith entered into by both parties, and that they both in good faith endeavored to perform the same, also that the only breach thereof was occasioned by plaintiff's inability and failure (whether through incompetency or otherwise being immaterial) to find purchasers so as to enable him to order and pay for the 50 cars aforesaid. During the entire time in which such contract was in force, no attempt was made by either party to rescind, cancel, or treat the contract at an end for any reason whatsoever, both apparently treating the same as in all respects a valid and enforceable contract. The evidence also tends to show that during all such period of time defendant held itself ready, able, and willing to furnish such cars as plaintiff might order, upon the terms stated in the contract.

Shortly after the expiration of the contract, and on September 25, 1911, this action was commenced to recover, as the complaint alleges, as for money had and received, the sum of \$1,000, being the amount claimed by plaintiff to have been deposited with defendant under such contract. Defendant answered, setting up the contract aforesaid, and alleging that the sum claimed in the complaint was deposited with it pursuant to such contract; alleging plaintiff's breach thereof and asserting its right to retain such deposit as liquidated damages pursuant to the terms of the agreement; and also alleging facts tending to show that, by plaintiff's breach, defendant suffered damages in a sum in excess of the amount of such deposit. Such answer also alleges by way of counterclaim a cause of action in its favor and against plaintiff upon a promissory note for \$350 and interest, executed and delivered by defendant to plaintiff on October 8, 1910. At the conclusion of the testimony the trial court directed the jury to return a verdict in defendant's favor, both on the cause of action alleged in the complaint and on the defendant's counterclaim aforesaid. Thereafter the trial court granted plaintiff's motion for a new trial, and from the order defendant appeals. The sole error assigned is the granting of the new trial. The grounds for making such order appear in a memorandum decision set out in the abstract, and in substance are that error was committed in directing the verdict for defendant, because of lack of proof that defendant ever

offered to deliver the cars to the plaintiff under the contract; the court saying: "If plaintiff had refused to accept the cars before time of delivery and acceptance had arrived, defendant would not be required to offer to perform as a prerequisite to relief by recovery of damages." The learned trial court evidently misconstrued defendant's answer wherein it alleged such damages merely as defensive matter, and not by way of counterclaim. Defendant did not seek to recover such damages under the contract on account of plaintiff's breach thereof, but it merely sought to plead and show such damages by way of defense. In other words, it was not incumbent on it to allege such matters at all, for the same or any other facts tending to show a want of equity in plaintiff's claim were provable under the denials in the answer. 27 Cyc. 881, and cases cited in note 16.

In *Hawks v. Hawks*, 124 Mass. 457, in speaking on this subject the court, among other things, said: "The general denial called on the plaintiff to prove not only the receipt of the money by the defendant, but that he received it under circumstances which gave the plaintiff a right to recover it. The defendant was entitled, under his answer, to establish any facts which would disprove the plaintiff's case. It was open to him to show that he did not receive the money, and that, if he did receive it, he was under no obligation to pay it to the plaintiff."

In the first opinion we reached a conclusion favorable to respondent. A rehearing was ordered, and the case has been reargued, and upon further consideration we feel constrained to depart from the views formerly expressed, and to now hold that the order granting such new trial was erroneous. The following reasons prompt us to arrive at this conclusion:

The action being for money had and received, it concededly follows that no recovery can be had by plaintiff without showing facts from which the law raises an implied promise on defendant's part to repay to plaintiff such deposit. In order to raise such an implied promise it is elementary that facts must be shown from which it is made to appear that, in equity and good conscience, defendant ought not to retain such deposit. Plaintiff has established such a showing, provided his promise be sound, that he has received no consideration for such deposit, or that such consideration has wholly failed. Numerous au-

thorities are cited by him where recoveries were sustained because of failure of consideration. Such authorities, no doubt, announce a correct rule, but are they applicable to the facts in the case at bar? We think not. It seems to be the contention of respondent's counsel that such contract merely amounts in substance and effect to an executory agreement for the purchase and sale of 50 automobiles, and that such deposit was exacted and paid as and for a part payment in advance on the purchase price, in the nature of a guaranty or earnest money for the faithful performance thereof by respondent, the same to be credited at the rate of \$25 on each car when purchased, and that defendant breached such contract by failing to deliver or tender for delivery to plaintiff, any of the cars. That as a consequence plaintiff received no consideration for the deposit, or that such consideration has wholly failed through the fault of defendant. The fallacy of such contention is made apparent from an inspection of the contract and a review of the evidence. What, in brief, are the salient features of this contract? In consideration of plaintiff's promise to purchase and pay for at least 50 Interstate cars at stated times, and to advance to defendant such deposit of \$1,250, to be applied on the purchase price as above stated, defendant granted to plaintiff for a specified period of time the exclusive right to sell such cars in ten counties of the state, and obligated itself to furnish such cars as plaintiff might order at certain discounts from list prices. This, in the eye of the law, was a valuable right. That it ultimately proved to be valueless to him does not justify the claim that such right was of no value in the eye of the law. If plaintiff had been successful in securing purchasers of cars, such right or privilege might have resulted in great benefit and profit to him. He was not restricted to the sale of 50 cars. No limitation as to the number was stipulated. How, therefore, under any possible theory can he properly ignore this important provision of the contract, and successfully assert that the entire consideration for this advance payment or deposit has failed because no cars were in fact sold? Was not the grant of this large territory something of value which defendant parted with, and did not plaintiff, during the entire period, enjoy such right to the exclusion of defendant and others? That he did, must be conceded. Therefore, unless it can be said that defendant refused to carry out the contract in respect to furnishing cars when ordered, or in

some other respect breached the contract on its part, how can a court say that in equity and good conscience defendant ought to repay such deposit? We assert, without the fear of successful contradiction, that no court ever held under such facts that an implied promise was created by law on defendant's part to make such repayment. It is only in cases where the contract has been breached by the vendor that the vendee has been held entitled to recover payments made on the purchase price, with the exception of cases involving facts and legal principles not present nor applicable in the case at bar. It cannot be denied that defendant, during the entire life of the contract, did everything it could reasonably be expected to do to carry out its provisions. On the contrary, the proof discloses that the plaintiff breached the contract by failing and neglecting to purchase 50 cars, or any cars, as he had promised and agreed to do. True, he in good faith attempted to fulfil the contract, and for some reason failed, but does this fact redound to his benefit by raising an equity in his favor? Are we to announce a precedent that he who enters into a losing bargain not induced by the fraud or the deceit of the other party, and who exercises rights conferred on him thereunder during the entire life of the contract, may thereafter successfully assert that in equity and good conscience he is entitled to a return of all that he parted with under the agreement? Such a precedent would, we fear, stand alone in the jurisprudence of this country.

Nearly a century ago the supreme court of New York in the case of *Ketchum v. Evertson*, 13 Johns. 359, used the following language, the correctness of which has, we think, never been challenged:

"It may be asserted, with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfil all his stipulations, according to the contract, has never been suffered to recover for what has been thus advanced or done. The plaintiffs are seeking to recover the money advanced on a contract, every part of which the defendant has performed, as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus have, themselves, rescinded the contract. It would be an alarming doctrine, to hold that the plaintiff might violate the contract, and, be-

cause they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."

The same court in a recent case announced a rule which seems to be applicable on principle to the case at bar, although in that case it was alleged that the defendant wrongfully breached the contract. The facts were that plaintiff took out five policies of life insurance with the defendant company, and, after the policies had been in force for sometime, the defendant forfeited the same for nonpayment of a premium, and plaintiff asked to recover as for moneys had and received by defendant to plaintiff's use, all premiums paid by her on the policies. The court held she could not recover, saying, among other things: "The question which arose upon the motion of the defendant's counsel for dismissal of the complaint was solely with regard to the plaintiff's right to recover in assumpsit as for money had and received by the defendant to her use, the premiums paid, and we concur in the justice's decision that the plaintiff had mistaken her remedy. Granting that upon the defendant's breach the plaintiff could treat the contract, with regard to each of the policies, as determined, it does not follow that the defendant was bound, *ex æquo et bono*, to restore the premiums received by it, for which, in part at least, the plaintiff had had value in the risk assumed by the defendant. Plainly, the plaintiff could not predicate a rescission of the contract of the defendant's breach, without restitution by her of what she had received under the contract; and a contract of life insurance being essentially indivisible, in point of performance, by either of the parties thereto, . . . such restitution was, in the nature of things, impossible. . . . The case at bar should be distinguished from a case where the failure of consideration for the premiums paid is entire, in that the risk to be assumed by the insurer under the policy never attached; the policy being avoided for noncompliance with a condition precedent, fraud, or other causes." *Skudera v. Metropolitan L. Ins. Co.* 17 Misc. 367, 39 N. Y. Supp. 1059.

The contention that this deposit cannot be retained because the stipulation in the contract authorizing its retention is in the nature of a penalty, which the law abhors and the Code expressly prohibits, is untenable for the reason that the actual damages caused by plaintiff's

breach of the contract are not susceptible of proof, and consequently the contract comes within the exception provided for in § 5370, Revised Codes 1905, which provides: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage." If, as respondent's counsel argue, the contract was one merely for the purchase and sale of 50 automobiles, their contention would have merit. But, as we have before stated, and as the instrument clearly provides, this is but one feature of the bargain. We are not at liberty to segregate this stipulation from the balance of the contract and say that it is the entire agreement. As a consideration for the exclusive right granted him to sell Interstate cars in these ten counties, and the defendant's undertaking to furnish cars as ordered at certain stipulated discounts from list prices, plaintiff agreed not only to purchase and pay for at least 50 cars, but he also agreed, among other things, to "faithfully represent and advertise such automobiles; make all reasonable efforts to promote and increase the sales thereof; keep in stock at least one of Interstate manufacture, for the sole purpose of demonstrating and exhibiting to prospective purchasers," etc. Clearly, therefore, it was within the contemplation of the parties that more than 50 cars might be placed in such territory by plaintiff under the contract, and, further, that defendant would or might derive benefits thereunder in addition to profits which it might make on sales of cars by plaintiff during the life of the contract. The parties, we think, had the right, therefore, to agree upon liquidated damages, for it is obvious that "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage" caused to defendant by a breach thereof. But in any event plaintiff is not entitled to recover such deposit, even if it be treated as a penalty instead of liquidated damages; for the proof shows that the actual damages suffered by defendant on account of plaintiff's failure to perform exceed the amount of such deposit. *Krausse v. Greenfield*, 61 Or. 502, 123 Pac. 392; *Bilz v. Powers*, 50 Colo. 482, 38 L.R.A.(N.S.) 847, 117 Pac. 344.

This brings us back to the original question as to whether the stipulated consideration going to plaintiff has failed. Just how and in what manner it has failed we are wholly at a loss to comprehend. Plaintiff, as before stated, operated under it during the entire term.

That he accomplished nothing of substantial benefit to him or to the defendant is not in the least controlling. It must be admitted that defendant parted with a consideration by conferring upon plaintiff the right to solicit and make sales of cars in these ten counties during the year, and it must also be conceded that such consideration has not and of course cannot be restored to it by plaintiff. Nor can defendant be placed *in statu quo*.

The theory upon which our first decision was based was that no consideration was received by plaintiff, because the contract was wholly executory and lacked mutuality. Consequently, it was a mere *nudum pactum*. We relied upon and erroneously misapplied certain authorities, including *Velie Motor Car Co. v. Kopmeier Motor Car Co.* 114 C. C. A. 284, 194 Fed. 324, and *Oakland Motor Car Co. v. Indiana Automobile Co.* 121 C. C. A. 319, 201 Fed. 499. These cases are not in point, for the plain reason that under their facts it appears that no part of the contracts had been executed and no benefits had been taken or consideration parted with thereunder.

In the *Velie Case* the manufacturer sued the dealer for damages for the latter's failure to perform the contract, he having repudiated the contract shortly after it was entered into.

In the *Oakland Case* the dealer sued the manufacturer to recover for loss of profits occasioned by the latter's repudiation of the contract shortly after it was entered into. Both decisions are predicated upon the fact that the contract was executory.

The case at bar is to be differentiated from those cases in the important facts that, even conceding that the contract at the time it was made was nonenforceable because of lack of mutuality, nevertheless, the parties saw fit during the entire life of the contract to treat it as a valid and subsisting contract governing the rights of the parties.

This, of course, they had a perfect right to do, for it is not contended that the contract was illegal and such an one as the parties could not recognize and carry out. To the extent, therefore, that the parties acted under and performed the same it is valid and enforceable, and must measure their respective rights. See *Peoples v. Evens*, 8 N. D. 121, 77 N. W. 93; *Fuller v. Rice*, 52 Mich. 435, 18 N. W. 204; *Pfeiffer v. Norman*, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W. 97; *Martinson v. Regan*, 18 N. D. 467, 123 N. W. 285; *Peoples v. Citizens'*

Nat. L. Ins. Co. 11 Ga. App. 177, 74 S. E. 1034; Grove v. Hodges, 55 Pa. 504, 2 Mor. Min. Rep. 698.

The theory upon which this court in its first opinion decided the case was not urged or relied upon by plaintiff's counsel, either in the district court or in their printed brief in this court, but, upon oral argument on rehearing, they adopted such theory for the first time. The fallacy of such theory is, we think, quite apparent when we consider the fact that both parties recognized and acted under the contract during its entire existence. If the contract was wholly executory on both sides and voidable for lack of mutuality, an entirely different situation would be presented, but plaintiff saw fit to avail himself of the privileges awarded him under the contract, and because he was unsuccessful in making sales of cars he now seeks to recover back what he parted with under the contract, although compelled to admit that defendant lived up to the contract in all respects in so far as plaintiff enabled it to do so.

The trial court was, we think, clearly in error in holding that defendant failed in its proof. It had no burden of proof to meet in order to defeat plaintiff's recovery. It did not seek to recover damages under the contract, but it merely sought to defeat plaintiff's recovery of such deposit by showing that it was actually damaged by plaintiff's breach to an amount greater than the deposit, thereby disproving any equity in plaintiff's claim. We think the proof amply sufficient for such purpose, but granting, for the sake of argument, that it failed, still plaintiff cannot recover in any event on the conceded facts, for the reason, as above stated, that he has failed to show that, in equity and good conscience, he is entitled to a return of the payments made by him. He breached the contract, while defendant faithfully complied therewith as far as plaintiff would permit it to do. Furthermore, as before stated, plaintiff is not in a position, even if willing, to restore to defendant what it parted with under the contract, so as to put it *in statu quo*.

"The action for money had and received proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange. And the other party to the contract must be placed in as good a position as he was before the contract was entered into." 27 Cyc. 871, and cases cited. How can plaintiff at this late date disaffirm

the contract which has lived its allotted life, during which time both parties acted under it? That plaintiff's action to recover such deposit as money had and received will not lie under the undisputed facts is elementary. In support of our views we deem the citation of authorities unnecessary, but see generally the article entitled, "Money Received." in 27 Cyc. 847-885. It is idle to contend from this record that defendant was in default in any respect. At no place in his testimony does plaintiff make any such claim. On the contrary, he testified in effect that defendant's officers, so far as he could judge from what they said and did, were anxious to have him make good under the contract, and that he did not know as they ever at any time put any hindrance in his way of making good under the contract. Certainly, in the light of the admitted fact that plaintiff wholly failed to secure purchasers of cars, and was unable to take and pay for any, no duty rested upon defendant of tendering delivery. Respondent evidently realized at the trial that he was confronted with a serious question under the facts regarding his right to recover such deposit as money had and received, for he sought to prove a conversation with Barrett at the time the written contract was executed to show, contrary to the express stipulation of such contract, that Barrett assured him in effect that such stipulation meant nothing, and that any balance of such deposit remaining at the end of the season was to be returned to respondent. There are two answers to such theory: First, this testimony was objected to and was clearly inadmissible as tending to vary the terms of the written contract; and, second plaintiff's action, being for money had and received, is necessarily predicated upon an *implied* promise to repay such money. If an express promise existed, the action should be based thereon. Furthermore, of what value as a guaranty of respondent's faithful performance of the contract would such deposit be if, as respondent undertook to prove, the same, or any balance remaining of such fund, was to be returned unconditionally?

The order appealed from is reversed.

Goss, J. (dissenting). With due deference to the opinion of the majority, the writer cannot concur therein. The real equities of this case seem to me to have been ignored and misplaced, while the decision in effect causes equity to work a forfeiture, something it abhors. This

result has come from what seems to me to be the erroneous assumption that the contract in question was such in law, and created legal obligations, instead of it being plaintiff's mere written offer, acceptable by its very terms only by performance and to the extent only of actual performance, and until performed wholly unilateral, and in any event terminable practically at the will of the parties, and therefore without performance, never legally obligating either party to abide by its terms; that consequently, in a strict legal sense, it had no lifetime nor term of existence, nor period for performance, and having none it could not lapse, and the failure to cancel it by either party could neither retroactively, as in effect held, nor otherwise, change the legal status of the parties. From the viewpoint of the writer the majority opinion has magnified mere privileges permitted into legal rights granted, and, from that as a basis, deduced resulting erroneously assumed obligations.

In the early summer of 1911, Gile worked his territory to procure purchasers, but a crop failure occurred in all the territory covered in his contract. Of the uselessness of expending effort in attempting sales under such circumstances defendant had notice, as is apparent from its telegram in evidence, dated July 18th, sent from Lakota to the plaintiff at Williston, and requesting him to come down there to make sales, where, because of rains, the prospects were better. It is true that the contract was never canceled, as plaintiff could have done at any time, according to its terms, on thirty days' notice, if in fact it ever obligated plaintiff at all. But the reason for noncancelation fully appears in the testimony. Plaintiff testified: "I told Mr. Barrett at the time that 50 cars was an awful lot to contract for, and what an awful bunch of money; and he says: 'You have a large territory, and if you need the cars, why you are sure you will get what is in the contract;' 'but,' he says, 'it doesn't make any difference whether you take any of them or not,' and the money was to be credited on the contract, as I ordered the cars in it, and the balance at the end of the season was to be turned over to me. He says: 'I want to know that you are going to work that territory.'" Defendant led plaintiff to believe, at the very inception of the contract, that his money would be returned if the cars were not taken, and this belief was but reasonable; for under the terms of the contract itself the deposit was to be returned to plaintiff as a credit

on cars as taken, and if the contract was canceled by defendant the money must also be returned. These provisions render the forfeiture clause of the contract ambiguous and susceptible of explanation by proof of an express oral construction given it by the parties contemporaneous with its execution and delivery, as to the return or non-return of the deposit money under the facts before us. This testimony is therefore admissible for its bearing upon the reason why the contract was allowed to lapse without cancelation, if importance be given the fact of failure to cancel. Not that this is important in the opinion of the writer. But it seems so much importance has been placed thereon in the majority opinion that apparently the decision has turned on plaintiff's failure to exercise his right of cancelation, while the reason for such failure has been utterly ignored. It is evident that plaintiff relied implicitly upon receiving fair, instead of unconscionable, business treatment from defendant. That his deposit of \$1,250 would be held back by it as forfeited, he evidently never contemplated for a moment.

The main opinion assumes, as a premise for the conclusion reached, that by this alleged contract plaintiff procured a right he did not prior thereto possess, to wit, the right to canvass and make sales in certain territory, and this presumably was of some value, and as such was a consideration sufficient to support the promise of plaintiff to canvass said territory and make sales therein, and as rendering the contract mutual, and as based upon a sufficient and adequate existing consideration. It is true that if there was a right granted by defendant to plaintiff, even though of little value, it will support the contract and amount to a valid consideration, the law not weighing the adequacy of consideration, but assuming that the parties have done so in entering into the agreement. But let us see whether at this time defendant parted plaintiff with anything of value, either as a forbearance or a grant. Assuming this contract to be wholly executory, which question assumed is treated later, its validity and binding force as a contract, dependent upon whether a valuable consideration has been passed, must be determined as of the time when it is made. See § 207, vol. 1, of Elliott on Contracts (1913) under a discussion of valuable consideration, reading: "Whether the contract rests upon a valuable consideration must be determined by the conditions as they exist when it is made, not as

they may be at some subsequent time." Citing *Casserleigh v. Wood*, 56 C. C. A. 212, 119 Fed. 308. Continuing from the same author: "In the absence of any sufficient consideration, the law supplies no means and affords no remedy to compel the performance of a simple executory agreement made without consideration; such a contract is a *nude pact*, and not binding in law, no matter how strongly it may appeal to the conscience." Citing many cases. And this is but the gist of the reasoning of our own court in *Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1051; and *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544. With this in mind an examination of the contract entered into October 8, 1910, shows a delivery of a designated number of cars each month for nine months, beginning November, 1910, to be made by defendant. Had the contract expressly stipulated defendant should deliver, and had plaintiff given orders October 8th for the November instalment of three cars, they were not deliverable until such time in November as defendant should elect, and it could, therefore, have made delivery November 30th, and literally complied with the terms of the contract. Hence November 30th was the first date at which a delivery was due or defendant be in default, assuming the contract to be binding. Viewing it as of the date when the parties were entering into it, October 8th (the rule under above authorities), as a contract the first instalment of which was not to be performed until November 30th, or fifty-two days after the date of the agreement, with a reservation in defendant of "the right to change all prices and discounts mentioned in this contract upon two weeks' notice in writing, duly mailed to the dealer" (§ 3), and the other reservation to both parties that the contract (§ b. of ¶ 13) "may be canceled by either party upon thirty days' written notice given to the other by registered letter, and such cancelation of this contract shall operate as a cancelation of all orders for automobiles . . . which have not been shipped prior to the date when such cancelation takes effect;" certainly on the signing of this agreement no obligation then arose against either party in favor of the other, as either could have forthwith canceled without assigning cause, and such cancelation would have, according to its terms, canceled the entire so-called contract, including any privilege conferred by defendant upon plaintiff to canvass the territory or any part of it, as well as that portion of the agreement contemplating the purchase and sale of

50 cars, including the three cars mentioned in the first instalment. Hence, in order for an obligation to arise under this instrument, it must be created from something taking place after it has been executed, and this in itself is the test of, as well as a conclusive demonstration of, want of mutuality of contract at the time of the execution and delivery of the instrument in question. *Velie Motor Car Co. v. Klopmeier Motor Car Co.* 114 C. C. A. 284, 194 Fed. 324; *Oakland Motor Car Co. v. Indiana Automobile Co.* 121 C. C. A. 319, 201 Fed. 499. All that defendant needed to do to thus avoid liability was to raise the prices in the first instance, under the third paragraph, to the full amount of the list price, and fail to fill the orders. Or it could have delayed filling the orders or transmitting them to the company, and given the thirty-day notice of cancelation required by ¶ 13, and unquestionably it would have been exonerated from all liability. *Oakland Motor Car Co. v. Indiana Automobile Co.* *supra*; *Wheaton v. Cadillac Automobile Co.* 143 Mich. 21, 106 N. W. 399. And what was true immediately after the signing of the contract was true throughout the entire so-called lifetime of it. 121 C. C. A. 319, 201 Fed. 499; *Cummer v. Butts*, 40 Mich. 322-325, 29 Am. Rep. 530, 114 C. C. A. 284, 194 Fed. 324. At no place in the contract has the defendant obligated itself, in all events, to deliver plaintiff a single car; and, of course, it not being bound, the plaintiff is not. And it is immaterial whether this purported contract be considered one of agency or of purchase and sale, or both, of cars; it is equally unenforceable in either event at any time for want of mutuality of contract. 114 C. C. A. 284, 194 Fed. 324-331. The principle is well stated in the note to *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, at page 543, et seq. "If there is no promise at all by one party, or if, though both have promised something, the promise of one is void, the promise of the other has no consideration to support it, and is therefore void. This is what we mean by 'want of mutuality in contract.' There can be no binding bilateral contract unless both of the parties are bound. There must be mutual binding promises, for mutuality of obligation is essential to supply the element of consideration. The rule of law that a promise is a good consideration for a promise requires that there should be an absolute mutuality of engagements, so that each party may have an action upon it or neither will be bound. *Stiles v. McClan*, 6 Colo. 89. The promises,

to constitute a consideration for each other, must be concurrent or become obligatory at the same time, otherwise each will be without consideration at the time it is made, and both will therefore be *nuda pacta*. . . . Keep v. Goodrich, 12 Johns. 397; Tucker v. Woods, 12 Johns. 190, 7 Am. Dec. 305; Buckingham v. Ludlam, 40 N. J. Eq. 422, 2 Atl. 265; Utica & S. R. Co. v. Brinckerhoff, 21 Wend. 139, 34 Am. Dec. 220." The right of arbitrary cancelation being reserved to both parties, neither was bound to perform. 121 C. C. A. 319, 201 Fed. 499; 114 C. C. A. 284, 194 Fed. 324; 40 Mich. 322, 29 Am. Rep. 530; American Agricultural Chemical Co. v. Kennedy, 103 Va. 171, 48 S. E. 868; McKinley v. Watkins, 13 Ill. 140; Houston & T. C. R. Co. v. Mitchell, 38 Tex. 85; § 10, under title "Contracts" in Decen. Dig. and §§ 21-40, under same title in Century Dig. citing many cases. For a case construing an automobile contract very similar to this, see Oakland Motor Car Co. v. Indiana Automobile Co. 121 C. C. A. 319, 201 Fed. 499, which case would be parallel in fact had the plaintiff immediately made the sales and submitted the orders, and defendant company exonerated itself from liability by canceling under the stipulation contained in ¶ 13. It was there held that the right of arbitrary cancelation utterly destroyed the mutuality of contract, and left no cause of action against the distributors. Of course, if this contract fails to bind the distributors, defendant company, it fails in mutuality, and the dealer, Gile, is also absolved from liability. In the face of these provisions, neither party under this contract can be bound while the contract remains executory, as it is. See also Chicago & E. R. Co. v. Dane, 43 N. Y. 242; Maynard v. Brown, 41 Mich. 298, 2 N. W. 30; Stembridge v. Stembridge, 87 Ky. 91, 7 S. W. 611; Cool v. Cunningham, 25 S. C. 136; Atlee v. Bartholomew, 69 Wis. 43, 2 Am. St. Rep. 103, 33 N. W. 110; Lowber v. Connit, 36 Wis. 183; 9 Cyc. 327; Velie Motor Car Co. v. Klopmeier Motor Car Co. 114 C. C. A. 291, 194 Fed. 324. Under similar contentions made in the Velie case to those here, that the right to canvass for sales enjoyed was valuable and remedied a lack of mutuality, the Federal circuit court says: "Unless the defendant [occupying our plaintiff's position] received a consideration for its undertakings by being given the exclusive right to sell within the given territory, the contract lacks mutuality. But it will be seen that such right, if any, was made subject to plaintiff's right to arbitrarily, and without assign-

ing any cause, cancel the contract. Defendant might well decline to go to the expense and trouble of advertising and developing the territory named when its rights might at any time be terminated. Whatever construction should be given to the contract, whether it be one of sale or of agency, while it remains executory, there must be mutuality. . . . Taking into consideration the whole contract, we are of the opinion that by reason of want of mutuality the contract is, under the circumstances, unenforceable." This contract before us is skilfully drawn with the very object of avoiding obligating defendant to do anything. Hence I assert with confidence that this so-called contract was not a contract in law when executed and delivered, as it was wholly wanting in consideration. Not that there was any failure of consideration, but an utter lack of consideration. If it is necessary to cite authority to sustain and distinguish between a failure of consideration and a lack of mutuality in contract, see the able discussion of the subject in §§ 301-308, vol. 1, of Page on Contracts, under the heading of "Apparent Considerations Which Are Nonexistent," under which, at § 303, lack of mutuality is treated in part as follows: "Mutuality of obligation may be lacking in at least three different classes of cases. In the first there does not purport to be any right conferred or foreborne in return for the promise; in the second there may be some apparently valid promise which, on analysis, does not by its terms fix any legal liability on the party making it; and, in the third, the promise offered as a consideration does by its terms attempt to fix a real liability, but by reason of some extrinsic fact, as incapacity of the party making the promise, the illegality of the thing promised, and the like, no enforceable liability attaches. These three classes of cases are not distinct in principle, but only in the manner in which the lack of consideration is more or less disguised." The agreement in question is vulnerable under both first and second subdivisions. At § 304 the authority continues: "Where the parties assume to make a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise. This is what is often meant by saying that promises must be mutual. Illustrations of this principle are an agreement that a manufacturer will sell all his goods in a given locality through A, who is to get a

specified commission, A not agreeing to do anything with reference to such sales; an employer's continuing a previous employment without being bound to continue it for any period of time, a promise to employ A where A is not bound to continue in the employment for any given period; a promise to do work assigned to the promisor where the adversary party is not bound by the promise to assign any work or to pay any compensation if no work is assigned," analogous to the agreement in question, and giving similar examples with cases cited in abundance, among which are *Peek v. Peek*, 77 Cal. 106, 1 L.R.A. 185, 11 Am. St. Rep. 244, 19 Pac. 227; *Vogel v. Pekoc*, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; *St. Louis, I. M. & S. R. Co. v. Matthews*, 64 Ark. 398, 39 L.R.A. 467, 42 S. W. 902; which with notes support the text. See also *Elliott on Contracts*, §§ 208-210. Notice also in the text the significance of the words "rights," "liabilities," and "obligations," as distinguished from mere license, privilege, or permission, as these latter must be the basis for any claim of defendant under recoupment or equitable defense, whichever the claim for retention of the deposit may be held to be. If said instrument did not by its terms and at the time of its execution and delivery place plaintiff under a legal obligation or a legal duty, and at the same time grant to defendant a resulting right to be breached or violated by nonperformance, he has no standing in court on the defense made. This is but another way of stating that if there was no contract or contract obligation, defendant could not be damaged, as he had no legal right that plaintiff breached. If these fundamentals be true, all discussion in the opinion of failure of consideration is as needless as it is inaccurate; likewise all comment therein about the contract, being voidable, is misleading, because there was no contract; likewise the discussion at some length of the legality of the subject-matter of contract, to the effect that the subject-matter was one that could legally be contracted about, is beside the case, because no contract that the law recognizes as such was entered into in regard thereto. Equally inappropriate is the citation of authority on the right of rescission of contract, such as the cases cited of *Ketchum v. Evertson*, 13 Johns. 359, 7 Am. Dec. 384; *Skudera v. Metropolitan L. Ins. Co.* 17 Misc. 367, 39 N. Y. Supp. 1059; *Peoples v. Evens*, 8 N. D. 121, 77 N. W. 93; *Fuller v. Rice*, 52 Mich. 435, 18 N. W. 204; *Pfeiffer v. Norman*, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W.

97; *Martinson v. Rogan*, 18 N. D. 467, 123 N. W. 285; *Peoples v. Citizens' Nat. L. Ins. Co.* 11 Ga. App. 177, 74 S. E. 1034; *Grove v. Hodges*, 55 Pa. 504, 2 Mor. Min. Rep. 698, because of no contract existing to rescind.

The decision of this case, in the first instance, turns upon whether a valid contract came into existence upon the signing and delivery of the only written agreement in the case, depending in turn on whether there was then a want of mutuality of contract, the equivalent of whether any consideration ever passed for the purported agreement, that is, whether or not that agreement by its terms was wholly lacking in or devoid of consideration, and hence in law a nullity so far as the basing thereon of legal rights or obligations or resulting liabilities for breach are concerned. I believe the agreement, at the time of its execution and delivery, was not a contract, but a mere offer, acceptable only by actual performance, and then only to the extent of such performance, inasmuch as the alleged contract is a separable one as to each monthly instalment of cars, taking the contention most favorable to defendant. "In some jurisdictions, however, such an agreement has been regarded not as an offer, but merely as an expression of willingness to negotiate. Where such theory obtains, sending in an order for goods at the specified rates is not an acceptance of a prior offer, but is itself an offer which may be rejected," quoting from *Page on Contracts*, § 307 citing *Page, Contr.* § 26, and *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* 57 L.R.A. 696, 52 C. C. A. 25, 114 Fed. 77. See also *Hoffman v. Maffioli*, 104 Wis. 630, 47 L.R.A. 427, 80 N. W. 1032; *Weaver v. Burr (Weaver v. Gay)* 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743; *Wardell v. William*, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796.

On rehearing had, after the former holding of this court that the agreement was nonenforceable because of want of mutuality, respondent's counsel contended that the executory contract, so-called, had become executed, and that inasmuch as the same had been suffered to lapse uncanceled it must be treated as a valid contract. This theory has been adopted in the majority opinion. Let us analyze it. Concede, as must be done under the unanimous holding of authority, that when signed this instrument did not amount to a contract for want of mutuality of consideration. Manifestly lapse of time alone, with no per-

formance, could not of itself remedy a lack of mutuality and so make a contract. But admittedly full performance would cure want of mutuality, and that which had not amounted to an executory contract would be considered as an executed one, and whereas, because of want of mutuality, no obligations had theretofore existed to perform, that defect may be eliminated by performance and the agreement become an executed contract. To what extent has this contract been executed? The answer necessitates a consideration of § 5365, Rev. Codes, 1905, defining executed and executory contracts, in connection with § 5311, further qualifying such statutory definition. The former section reads: "An executed contract is one the object of which is fully performed; all others are executory." The object of contract, within § 5311, is defined to be: "The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not to do." Our statutory definition of executed and executory contracts is identical with and was probably taken from what is now § 1661 of Kerr's Anno. Codes of California. If we treat this agreement as containing both an agency and a sale feature, a contention most favorable to respondent's contention, nevertheless we find that title has not passed to a single automobile or part concerned in such sale feature, and the transfer of title has been held to be the test in California under their Code, § 1661. Until transfer of title of the subject-matter of a contract of sale, the contract remains executory under said section. See *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Yukon River S. B. Co. v. Gratto*, 136 Cal. 538, 69 Pac. 252; *Cardinell v. Bennett*, 52 Cal. 476. For the holdings and definitions of executed and executory contracts, see *Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1051; *Fox v. Kitton*, 19 Ill. 519; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Fletcher v. Peck*, 6 Cranch, 87-136, 3 L. ed. 162-177; *Cincinnati, H. & D. R. Co. v. McKeen*, 12 C. C. A. 14, 24 U. S. App. 218, 64 Fed. 36-46; *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720; *State v. Jersey City*, 31 N. J. L. 575, 86 Am. Dec. 240; *Keokuk v. Ft. Wayne Electric Co.* 90 Iowa, 67, 57 N. W. 689; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. South Dakota, in construing this identical statute in *Mettel v. Gales*, 12 S. D. 832, 82 N. W. 181, says: "Executed contracts are not properly contracts at all. The term is used to signify rights in property which have been acquired by means of contract. The parties are no

longer bound by a contractual tie." See Words & Phrases, vol. 3, under titles "Executed Contract" and "Executory Contract." It certainly cannot be seriously contended that this so-called contract is other than executory as to the purchase and sale of cars, as not a single car has been ordered or delivered or handled under it. Defendant complains that plaintiff has wholly defaulted in such respect, which alone is wholly inconsistent with a partial or complete performance. As to the agency feature of the purported contract, wherein, as stated in the majority opinion, plaintiff had agreed to "faithfully represent and advertise such automobiles, keep in stock at least one of Interstate manufacturer for the sole purpose of demonstrating and exhibiting to prospective purchasers," etc., as well as the appointment of subagencies mentioned under paragraph one of the agreement, under the evidence the contract is equally totally unperformed. In the majority opinion the injury resulting from this default is made the sole basis for upholding the enforcement of the penalty, on the ground that damages suffered because of such defaults are so "impracticable or extremely difficult" to ascertain and assess, that they may be stipulated to be liquidated under the exception to the general rule for stipulated damages, and under § 5370, Rev. Codes 1905. In other words, if the majority holding is based upon the contract becoming executed by what was done by advertising and soliciting in attempting to carry it out, and in the absence of any sales, and it is conceded that no sales were made, then it is inconsistent with that portion of the main opinion necessary to support the liquidated damage feature, based not on performance, but on default in such respect. To be consistent the opinion throughout must treat this, the agency feature of the contract, as executory or executed,—one or the other. It cannot treat it as it has, as executed, for the purpose of curing a lack of mutuality in contract, and at the same time, as a peg upon which to hand a claim of liquidated damages, find it executory. If executed as to its agency provisions, an utter impossibility, of course, without it being executed as to sales, as one feature cannot be separated from the other, no damage for failure to establish agencies and advertise has accrued, because the agencies must have been established and the advertising must have been done. However, under the evidence and the pleadings as well, the agency feature as well as the sale part of the so-called contract has never in any particular been carried out, un-

less we say that a mere good-faith endeavor, with nothing really accomplished toward actual performance, amounts to a performance, and renders an executory contract executed, and thereby renders what was not a contract, because of want of mutuality, and executed contract, under which the law will measure the rights arising from acts done, not mere promises to perform. It must be conceded that the law is that performance under a unilateral contract can bind for any purpose only to the extent of the performance had. This seems to be the undisputed doctrine of the authorities. *Gray v. Hinton*, 2 McCrary, 167, 7 Fed. 81; *American Refrigerator Transit Co. v. Chilton*, 94 Ill. App. 6; *Morrow v. Southern Exp. Co.* 101 Ga. 810, 28 S. E. 998; *Dayton, W. & X. Turnp. Co. v. Coy*, 13 Ohio St. 84. In the latter case the party occupying the defendant's position here actually had the equities with him, but the court said, in replying to the same contention here made, that the parties had treated the contract as valid, as follows: "We have been asked by the counsel for the plaintiff if we found there was no mutuality in the contract, still to look at the conduct of the defendant,—his purpose in the execution of the instrument. But we do not see how we can look at the conduct of the defendant with any other view than to ascertain whether he has entered into a contract. In such a case as this it is not our province to decide as to the propriety of the conduct of the party. We have only to inquire whether he has incurred a legal obligation."

That this contract is not executed, but executory, is squarely decided by *Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1051, in an opinion by Judge Morgan, in an action for specific performance where mutuality of contract and alleged performance were presented for determination. It was there contended that by an offer of performance and tender "the nonmutuality of the contract is rendered immaterial." The court held: "Since Robinson could not enforce specific performance against Knudtson under the facts of this case, specific performance could not be enforced by Knudtson against Robinson. There must be mutuality of obligation and remedy between the parties before specific performance is enforceable against either, except in cases where there has been performance by the party seeking to enforce specific performance. . . . 'Performance' is a word of settled meaning, and means the doing or completing of an act; 'an offer to perform' and

'performance' are not synonymous in meaning. Without performance the party seeking the enforcement of the contract is not within the provisions of the statute when he has tendered performance or simply shown a willingness to perform. *Crumbly v. Bardon*, 70 Wis. 385, 36 N. W. 19; *Lattin v. Hazard*, 91 Cal. 87, 27 Pac. 515." It is significant that not a single authority is cited on this question in the majority opinion, which does not even discuss the statutory provisions above quoted, but evidently relies wholly upon the effect of a lapse of time with no principle of estoppel involved, making a contract out of something that, up until the last day of the so-called period of time mentioned in the purported agreement, was not a contract, but unenforceable as wholly lacking in mutuality of contract. Reduced to a nutshell, these parties have signed a written instrument, binding neither, granting certain privileges but neither obligating the other, and therein stated that such privileges shall remain, subject to prior arbitrary cancellation, from October 8, 1910, to September 1, 1911. Nothing was done toward performance except useless effort accomplishing nothing toward actual performance. After September 1, 1911, that which was prior to that time merely written permission or privilege, by lapsing and becoming nonexistent, has by something little short of legerdemain ripened into a legal contract. With due respect to the opinion of a majority of my associates, it is impossible for me to see how this result can be achieved under the evidence in this case, and conform to settled principles and fundamentals.

My contentions are summarized into the following statement: When the purported contract is analyzed with reference to these fundamental principles of contract, under all authorities and under the stipulated terms and conditions of the purported contract itself, I can reach no other conclusion than that the written instrument, when executed and delivered, was wholly lacking in mutuality of contract in that no consideration passed, and that no obligations of either party to the other were created, inasmuch as neither party procured under this instrument any legal right, or assumed any legal duty or obligation to the other; that lapse of time alone could not in such respect change the legal status of the parties in the slightest degree, no principle of estoppel being involved; that performance, on the contrary, could bring into existence for the first time between these parties, so far as this instrument is con-

cerned, rights and resulting legal obligations, but only to the extent of performance, partial or full; that a part performance could bind neither party to make full performance, but would obligate the parties so far as rights arose under such part performance, as for example, the delivery was made in good faith by plaintiff to sell cars, with the intent on his order would obligate him to pay for them, but would not obligate him as to any of the remaining 47 cars mentioned in the instrument, and a similar delivery and acceptance of 30 cars would bind the parties to that extent, but no further. But under the evidence as well as the pleadings no performance whatever has been had. Instead, an attempt was made in good faith by plaintiff to sell cars, with the intent on his part that he would perform this so-called contract, and defendant had some cars on hand with which to have filled any order for cars he might have submitted, and no cancelation of the contract was had, but the same permitted by sufferance of the parties to remain uncanceled until it lapsed. Under these circumstances I can conceive of no legal principle which cures the want of mutuality of contract and creates a contract with its resulting obligations. Defendant was never legally bound to deliver cars or do anything else, and plaintiff was never bound to sell cars or do anything else, and hence he was never legally obligated to defendant. With no obligation or right possessed by defendant and owing it by plaintiff, there was nothing to breach upon which damage can be predicated. Under these circumstances the defendant has received from plaintiff this deposit of \$1,250, for which he has given no consideration whatever; nor has he parted therefor to plaintiff with anything of value in the eye of the law, nor has he forbore anything because he has not obligated himself to forbear. Instead, he stands before a court shorn of a defense. His purported defense, at the most, epitomized, is equivalent to asserting that in return for this money he merely permitted plaintiff to believe himself possessed of a right to canvass for and perhaps sell cars in certain territory, while in law he never gave him such a right nor parted with such right, and at any time he could defeat plaintiff's attempt at sales, at his whim or caprice, by refusing to deliver the cars plaintiff was attempting to sell. Such an unconscionable plea, which in justice at least should be unavailing, is by the majority opinion upheld, and a forfeiture enforced of what is clearly a penalty. As stated in the opinion, this action for money had

and received possesses equitable characteristics, and to that extent the plaintiff is in a court of equity, a court of conscience, and this as a reviewing court is the same. Would any member of this bench consider it a conscionable transaction with a fellow man to forfeit, or, to use the softer word, retain a like amount of another's money under the same circumstances as disclosed in this record? The answer to this must suffice to establish the forfeit as either conscionable or unconscionable, equitable or inequitable, from the standpoint of which we must view plaintiff's attempted recovery as for money had and received, and alleged to have been received under such circumstances that equity and good conscience should order its return. Fair dealing must not only brand plaintiff's position as conscionable and right, but defendant's as unconscionable, if not worse. Under the law and the fact plaintiff should recover.

BURKE, J. I concur in the foregoing dissent.

A. B. MALIN and Maria E. Dobler, as Administrators of the Estate of Gottlieb J. Dobler, Deceased, v. COUNTY OF LAMOURE, State of North Dakota, a Municipal Corporation, State Tax Commission, *Amicus Curiae* Intervener.

(50 L.R.A.(N.S.) 997, 145 N. W. 582.)

Act — bill — title — one subject — Constitution — taxation — uniform rule — county courts — estates — fees for probate.

1. Chapter 119 of the Laws of 1909, which is entitled: "An Act to Amend § 2589 of the Revised Codes of 1905, Relating to the Fees of County Court," and which provides for an initial fee of \$5 and an additional charge of \$5 for each and every \$1,000 or fraction thereof in excess of the first thousand dollars on the value of the estates, to be paid by the petitioner for letters testamentary, of administration, or of guardianship, is unconstitutional in so far as the additional charge or fee of \$5 for each and every thousand dollars or fraction thereof in excess of the first thousand dollars is concerned, and violates § 11, article 1, of the Constitution of North Dakota, which provides that: "All laws of a general nature shall have a uniform operation;" § 22, article 1, which provides that "all courts shall be open, and every man, for any

injury done to him in his lands, goods, person, or reputation, shall have remedy by due process of law, and right and justice administered without sale, denial, or delay;" § 61, article 2, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title," etc.; § 175, article 11, which provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied;" and § 176, article 11, which provides that "laws shall be passed, taxing by uniform rule all property according to its true value in money." The same is true of § 2589, Rev. Codes 1905, being chapter 87 of the Laws of 1905, and of chapter 127 of the Laws of 1913, and in so far as the fee or charge of \$5 for each and every \$1,000 or fraction thereof in excess of the first one thousand dollars is concerned. Chapter 66 of the Laws of 1903, and § 2071 of the Rev. Codes of 1899, being chapter 50 of the Laws of 1890, however, are invalid even as to the initial fee of \$5, as such is not imposed upon all estates equally, but according to the value thereof. They are necessarily equally invalid as to the added fee of \$5 for every \$1,000 additional value.

Fees of county courts — estates — inheritance taxes — words — incompetents — Constitution.

2. The fees or charges provided for in chapter 119 of the Laws of 1909 are not inheritance taxes or analogous thereto. An inheritance tax is a tax or charge upon the privilege of succeeding to or inheriting property, and is paid out of that which is inherited, while the charges in question are levied not only upon the estate as a whole, whether solvent or insolvent, but upon the estates of wards and incompetents.

Costs — work performed — proportionate.

3. Such charges cannot be regarded as mere court costs, as they are in no way proportionate to or based upon the work performed or the services rendered.

Taxes upon property — privilege — value of property — levy — invalid — not uniform.

4. They are taxes upon property rather than taxes upon or charges for a privilege. As such they are invalid, as they are not levied according to the true value of such property, or to the uniform rule which is adopted in regard to similar property.

Constitution — courts — open — remedy — restraints — charges.

5. Section 22, article 1, of the Constitution of North Dakota, which provides that "all courts shall be open, and any man for any injury done him in his lands, goods, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial, or delay," is aimed, not merely against bribery and the direct selling of justice by magistrates and officials, but against the imposition of unreasonable restraints upon and charges for the use of the courts.

Charges — officer — color of law — public services — paid under protest — compulsion — duress — recovery from county.

6. Such charges having, in the case at bar, been demanded of the plaintiff by an officer acting under color of law, and for public services which the plaintiff was entitled to have performed, and having been paid under written protest and under circumstances where injury to the estate and to third parties would have resulted from a refusal to pay such fees, and a resort to legal remedies to compel the performance of the official duties, were paid under compulsion and duress, and can be recovered from the county upon a proper showing being made.

Part of statute unconstitutional — validity of remainder.

7. Where a part of a statute is unconstitutional, that fact does not require the courts to declare the remainder void also, unless all the provisions are connected in subject-matter depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other.

Reasonable court fees — requirement for — uniformity — valid.

8. A requirement for reasonable court fees will be sustained, and is not unconstitutional as being a denial or sale of justice, provided that the fee is reasonable, is uniform in its application, and has some reasonable connection with the services rendered. The portions of the statute before considered, therefore, which provide for an initial fee of \$5 and for the expenditures for publishing and sending out notices, are valid and are sustained.

Opinion filed February 16, 1914.

Appeal from the District court of LaMoure County, *Coffey, J.*
Appeal from an order overruling a demurrer.
Affirmed.

Statement by BRUCE, J.

The plaintiffs herein as administrators of the estate of Gottlieb J. Dobler, deceased, paid under protest to the county treasurer of LaMoure county the statutory probate fees, amounting in the case to \$335, and prescribed by § 2589, Rev. Codes 1905, as amended by chapter 119 of the Laws of 1909, and thereafter brought this action in the district court of LaMoure county to recover the sum so paid, alleging in their complaint that the act under which the same was paid was unconstitutional. A demurrer was interposed to the complaint and overruled. From the order overruling this demurrer this appeal is taken.

Chapter 119 of the Laws of 1909 reads as follows: An Act to Amend § 2589 of the Revised Codes of 1905, Relating to the Fees of County Court. Be it enacted by the legislative assembly of the state of North Dakota: § 1. Amendment Section 2589 of the Revised Codes of 1905 of the state of North Dakota is hereby amended to read as follows: § 2589. County to be Reimbursed. How. For the purpose of reimbursing the county for the salaries provided in the foregoing sections to be paid the judges of county courts, each petitioner for letters testamentary, or administration or guardianship, before filing the same in the county court, shall pay or cause to be paid into the county treasury, for the use and benefit of the county in whose county court proceedings are to be instituted to settle the estate of a deceased person or for the appointment of a guardian, the sum of five dollars, and when the value of said estate has been ascertained by the court, through the inventory and appraisement or upon hearing of same, as legally required, within thirty days after the issuance of letters testamentary, administration or guardianship, the judge of said court shall require an additional fee to be paid from said estate into said county treasury, of five dollars for each and every one thousand dollars or fraction thereof, in excess of the first one thousand dollars of value therein found, as shown by said inventory and appraisement, and in all cases in addition thereto, all sums necessarily expended in publishing or serving notices required by law. In all civil and criminal actions the same fees and costs shall be paid as in like actions in the district court, the same to be paid to the clerk of the county court, a record to be kept thereof, and the same turned over by him to the county treasurer."

Chapter 66 of the Laws of 1903 (§ 2589 of the Revised Codes of 1905), which chapter 119 of the Laws of 1909 amends, is as follows: "An Act to Amend § 2071 of the Revised Codes of 1899, Relating to Reimbursing Counties for Salaries Paid to Judges of County Courts. Be it enacted by the legislative assembly of the state of North Dakota: § 1 Amendment, Section 2071 of the Revised Codes of 1899, relating to reimbursing counties for salaries paid to judges of county courts, is hereby amended so as to read as follows: § 2071. County to be Reimbursed. How. For the purpose of reimbursing the county for the salaries provided in the foregoing sections to be paid to the judges of

the county courts, each petitioner for letters testamentary, of administration or guardianship, before filing the same in the county court, shall pay or cause to be paid into the county treasury, for the use and benefit of the county in whose county court proceedings are to be instituted to settle the estate of any deceased person, or for the appointment of a guardian, a sum of money according to the value of the estate of such deceased person, or of such ward, as appears from the sworn statement in the petition of such applicant: Five dollars when the value of the estate does not exceed one thousand dollars; five dollars additional for each and every one thousand dollars additional value thereto; and in all cases in addition thereto, all sums necessarily expended in publishing or serving notices required by law. In all civil and criminal actions the same fees and costs shall be paid as in like actions in the district court, the same to be paid to the judge of the county court, a record to be kept thereof and the same turned over by him to the county treasurer."

Section 2071 of the Revised Codes of 1899, which is amended by chapter 66 of the Laws of 1903, is but a restatement of § 4 of chapter 50 of the Laws of 1890, which section is as follows: "Section 4. How County Treasurer to be Reimbursed. For the purpose of reimbursing the county treasurer for the salaries provided in the foregoing sections to be paid to the judges of the county courts, each petition for letters testamentary, administration or of guardianship, before filing the same in the county court, shall pay or cause to be paid into the county treasury, for the use and benefit of the county in whose county court proceedings are to be instituted to settle the estate of any deceased person or for the appointment of a guardian, the following sums, according to the value of the estate of such deceased person or [for the value of the estate of such deceased person or] of such ward, as appears by the sworn statement in the petition of such applicant, that is to say: Five (5) dollars when the value of such estate does not exceed the sum of five hundred (500) dollars; ten (10) dollars when the value of such estate does not exceed the sum of \$1,500; fifteen (15) dollars when the value of such estate does not exceed \$2,500; twenty (20) dollars when the value of such estate does not exceed \$5,000, but does exceed \$2,500; twenty-five (25) dollars when the value of such estate exceeds the sum of \$5,000, and shall not exceed \$10,000; thirty (30) dollars when such

estate exceeds the sum of \$10,000, but not \$15,000; forty (40) dollars when the value of such estate shall exceed the sum of \$15,000, but not of \$20,000; fifty (50) dollars when the value of such estate exceeds the sum of \$20,000, but not of \$25,000; and seventy-five (75) dollars in all cases where the value of such estate shall exceed the sum of \$25,000, and in all cases in addition, all sums necessarily expended in publishing or serving notices required by law. And in the adjudication of all civil and criminal actions the same fees and costs shall be paid as in like actions and matters in the district court, the same to be paid to the judge of the county court, a record [to] be kept of, and by him turned over to the county treasurer."

This act contained other provisions, and its title was: "An Act to Fix the Compensation of the Judges of the County Courts and Provide a Fund to Reimburse the County for the Same." Section 4 of chapter 50 of the Laws of 1890 is copied *verbatim* into the Revised Codes of 1895, being § 2071 thereof. The same being true of chapter 50 of the Laws of 1890, with the exception that § 2 is amended as to the amount of salary of the clerk and § 3 as to the determination of the population upon which the salaries are based.

The petition placed the right to recover upon the proposition that the statute in question violated the following provisions of the Constitution of North Dakota:

(1) Section 11, article 1, "All laws of a general nature shall have a uniform operation."

(2) Section 22, article 1, "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay."

(3) Section 61, article 2, "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

(4) Section 175, article 11, "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

(5) Section 176, article 11, "Laws shall be passed, taxing by uniform rule all property according to its true value in money," etc.

Walter H. Murfin, for appellant.

If a state may deny the privilege of succession, it follows that, when it grants it, it may annex to the grant any condition which it supposes to be required by its interests or policy. The charge involved in this case amounts to an inheritance tax. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

No bill shall embrace more than one subject. N. D. Const. art. II. § 61; *Re Magnes*, 32 Colo. 527, 77 Pac. 853; *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863; *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; *Eaton v. Guarantee Co.* 11 N. D. 79, 88 N. W. 1029.

The means and instrumentalities by which the purposes of an act are to be accomplished need not be expressed in its title. *State v. Applegarth*, 81 Md. 293, 28 L.R.A. 812, 31 Atl. 961; *People v. Parks*, 58 Cal. 635; *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182, 11 S. W. 108; *O'Leary v. Cook County*, 28 Ill. 538.

"Due process of law" means an orderly proceeding adapted to the nature of the case, in which the citizen has the opportunity to be heard as to rights involved. 8 Cyc. 1082; *Doyle's Petition (Re Gannon)* 16 R. I. 537, 5 L.R.A. 359, 27 Am. St. Rep. 759, 18 Atl. 159; *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. 543.

If this is an inheritance tax, then a personal notice and opportunity to be heard, or to resist, is not necessary, as in case of a *tax on property*. *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101; *Hacker v. Howe*, 72 Neb. 385, 100 N. W. 1127, 101 N. W. 255; *Hostetter v. State*, 26 Ohio C. C. 702; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. St. Rep. 533.

An inheritance tax graduated in proportion to the amount of the inheritance is not unconstitutional. *Re Fox*, 154 Mich. 5, 117 N. W. 558; *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Humphreys v. State*, 70 Ohio St. 67, 65 L.R.A. 776, 101 Am. St. Rep. 888, 70 N. E. 957, 1 Ann. Cas. 233; *Re Campbell*, 143 Cal. 623, 77 Pac. 674; *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685.

It is only necessary that equal protection is given to all coming under each classification, in such a law. *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 Ann. Cas. 25; *Peacock v. Pratt*, 58 C. C. A. 48, 121 Fed. 773; *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Re Blackstone*, 171 N. Y. 682, 64 N. E. 1118; *St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 629; *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

The law in question is neither local nor special in its application. *Gilson v. Rush County*, 128 Ind. 65, 11 L.R.A. 835, 27 N. E. 235; *Burnham v. Webster*, 5 Mass. 268; *Crawford v. Linn County*, 11 Or. 482, 5 Pac. 738; *Young v. Bank of Alexandria*, 4 Cranch, 384, 2 L. ed. 655; *State ex rel. Bell v. Frazier*, 36 Or. 178, 59 Pac. 5.

Succession to an inheritance may be taxed as a *privilege*, notwithstanding the *property* of the *estate* is taxed. *Re Magnes*, 32 Colo. 527, 77 Pac. 853; *State v. Alston*, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; *West v. Phillips*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 Ann. Cas. 25; *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, affirmed in 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Cooley*, Taxn. pp. 8, 30, 584.

Taxes on business or on parties commencing suits, or *special assessments*, are *not* taxes on *property*. *Newby v. Platte County*, 25 Mo. 258; *Aachen & M. F. Ins. Co. v. Omaha*, 72 Neb. 518, 101 N. W. 3; *Cobb v. Durham County*, 122 N. C. 307, 30 S. E. 338; *State ex rel. Atchison & N. R. Co. v. Lancaster County*, 4 Neb. 537, 19 Am. Rep. 641.

If these fees are taxes at all, they are inheritance taxes, and the law is valid. 24 Am. & Eng. Enc. Law, 433, 435; *Clymer v. Com.* 52 Pa. 187; *Strode v. Com.* 52 Pa. 181; *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096.

The possibility of a condition arising involving inequality among those who may feel the ultimate stress of the duty imposed, furnishes no ground for attack for nonuniformity. *Hopkins's Appeal*, 77 Conn. 644, 60 Atl. 657; *Re Morris*, 138 N. C. 259, 50 S. E. 682; *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac. 947; *Nunnemacher v. State*, 129 Wis. 190,

9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267.

The right of the government to provide means and methods of taxation, as to classes or objects, is unquestioned. *Re Keency*, 194 N. Y. 281, 87 N. E. 428; *State ex rel. Foot v. Bazille*, 97 Minn. 11, 6 L.R.A. (N.S.) 732, 106 N. W. 93, 7 Ann. Cas. 1056; *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101; *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76.

The legislature may tax privileges, discriminate between relatives, and grant exemptions, without violating the rule requiring uniformity. 2 *Woerner*, Am. Law of Administration, 691a; *Re Magnes*, 32 Colo. 527, 77 Pac. 853.

Legacy and inheritance taxes have been in many states, and while of the assailed, have been upheld. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685.

Davis & Warren, for respondent.

Is § 2589, revised codes of 1905, as amended by chapter 119 of the Laws of 1909, constitutional? This is the only question here involved. The respondents contend that the so-called *fee* is a property tax. 37 Cyc. 713; *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012; *Cook County v. Fairbank*, 222 Ill. 578, 78 N. E. 895; *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948; *State ex rel. Nettleton v. Case*, 37 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51.

(Brief presented and filed with the consent of the court, on behalf of appellant county, by *L. E. Birdzell* and *Geo. E. Wallace*, attorneys and members of the North Dakota tax commission, as *Amici Curiae*.)

That part of the law in question, requiring an initial fee of \$5 to be paid to the county court upon filing a petition for the probate of an estate is valid, and not in conflict with any provision of our Constitution. *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948; *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012; *State ex rel. Nettleton v. Case*, 39 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; *State ex rel. Sanderson v. Mann*, 76 Wis.

469, 45 N. W. 526, 46 N. W. 51; *Lewis v. San Francisco*, 2 Cal. App. 112, 82 Pac. 1106; *Trower v. San Francisco*, 152 Cal. 479, 15 L.R.A. (N.S.) 183, 92 Pac. 1025; *Cook County v. Fairbank*, 222 Ill. 578, 78 N. E. 895; *Mearkle v. Hennepin County*, 44 Minn. 546, 47 N. W. 165.

An act may be valid *in part*, and the court have the right to separate, and to so declare, if that part which *remains* is *complete* and enforceable in itself. *Cooley*, Const. Lim. 7th ed. 24; *State v. Klectzen*, 8 N. D. 286, 78 N. W. 984, 11 Am. Crim. Rep. 324; *Hirschfeld v. McCullagh*, 64 Or. 502, 127 Pac. 541, 130 Pac. 1131; *State ex rel. Minces v. Schoenig*, 72 Minn. 528, 75 N. W. 711; *Morrow v. Wipf*, 22 S. D. 152, 115 N. W. 1121; *Exchange Bank v. Hines*, 3 Ohio St. 1; *State v. Estabrook*, 3 Nev. 173; *Robinson v. Bidwell*, 22 Cal. 379.

BRUCE, J. (after stating the facts as above).

The statute under consideration was adopted from Minnesota in 1890. Prior to its adoption by us, however, and in April 1889, it was declared invalid by the Minnesota courts. See *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948. If the rule were followed that a statute is presumed to have been adopted with the construction placed upon it by the state of its origin, the statute would have been stillborn in North Dakota. We are perfectly satisfied, however, that the North Dakota legislature had no knowledge of the Minnesota case. Since the decision of the Minnesota case, similar if not identical statutes, and under similar if not identical constitutional provisions, have been passed upon and declared invalid by the supreme courts of California, Washington, Minnesota, Illinois, Wisconsin and Missouri. See *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012; *State ex rel. Nettleton v. Case*, 39 Wash. 177, 1 L.R.A. (N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; *State ex rel. Mann v. Brophy*, 38 Wis. 413; *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; *Cook County v. Fairbank*, 222 Ill. 578, 78 N. E. 895; *Mearkle v. Hennepin County*, 44 Minn. 546, 47 N. W. 165; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245. See also 37 Cyc. 713, and cases cited. In fact, we have yet to find a single instance in which a similar statute has been upheld, either in the adjudicated cases or the *dicta* of the text writers.

The conclusion of these authorities, indeed, is that the charges, being

arbitrary, and not in any manner proportionate to the work done, are taxes, and not fees. As taxes they are held to be taxes upon property, rather than taxes upon a privilege, and therefore void because not imposed by uniform rule according to the true value in money.

If the charges could be looked upon in the nature of inheritance taxes, they could perhaps be sustained, but they are not inheritance taxes, as an inheritance tax is a tax upon the privilege of succeeding to or inheriting property, and is paid not out of the estate as a whole, but out of that part of it which is inherited. This is not the case with the present charge. It is an ad valorem charge levied upon the estate, whether solvent or insolvent and is imposed not merely upon the estates of decedents, but upon the estates of minors and incompetents under guardianship. It is either, indeed, a tax upon property, or, if a tax or charge upon a privilege, a tax or charge upon the privilege of administering an estate or of enjoying the protection of the courts as a ward. "But the sums required by this act to be paid into the county treasury," says the supreme court of Minnesota in *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948, "must be regarded as taxes, in the ordinary sense of that word, and as it is used in the Constitution. They are not in any proper sense fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. They have no proximate relation to the amount of the compensation to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings. There is no necessary, natural, or even probable correspondence between the sums to be paid (widely different in amounts with respect to estates of different values) and the nature of the proceedings, or the character or extent of the services, which may be required in the probate court. It cannot be assumed, upon any ground of probability, that these proceedings or services will be different or greater in the case of an estate of the value of more than \$500,000 than in one of the value of from \$35,000 to \$50,000,—yet in the former case \$5,000 must be paid, in the latter \$100. . . . The purpose for which such payments are required is strictly public in its nature, being directly . . . and indirectly for the support of a court established by the Constitution, with exclusive

original jurisdiction in certain matters of great and general public concern. Nor is it practically optional with executors or administrators, or those interested in the settlement of the estates of deceased persons, as to whether they will pay these exactions or not. If the law is valid, payment is practically necessary in the great majority of cases; and the mode adopted by the statute of securing payment by making that a condition precedent to the exercise of the functions of the probate court is as really compulsory, and perhaps as effectual in general, as the means generally employed to enforce the payment of taxes." Again, in *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012, we find the following: "It is perfectly plain that the legislature has attempted by that portion of § 1, above quoted, to levy a property tax upon all estates of decedents, infants, and incompetents. The ad valorem charge for filing the inventory is in no sense a fee, or compensation for the services of the officer, which are the same as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion. And it is not merely an inheritance tax, or at all analogous to an inheritance tax, as counsel would contend; for, in the first place, it applies not only to the estates of decedents, but also to the estates of minors and incompetents under guardianship; and, as to the estates of decedents, it applies not to the distributable residue after payment of debts and expenses of administration, but to the whole body of the estate, and would be collectable, if the law were valid, from an insolvent estate, as well as from one of equal appraised value and with no liabilities. As an attempt to levy a property tax, the act is in this particular invalid for several reasons; 1. It violates § 1 of article 13 of the Constitution, in imposing an extraordinary tax upon the property to which it applies, in addition to the equal and uniform tax to which alone all property in the state is liable. 2. The subject of the act is not expressed in its title, and is in no wise germane thereto—a violation of § 24 of article 4 of the Constitution, which requires that every act shall embrace but one subject, which subject shall be expressed in its title."

We realize fully that reasonable court charges have generally been sustained by the authorities. We also realize that the creditor had little protection under the ancient law, and that it was only after many centuries that he could seek reimbursement from the estate of the deceased. See *Pulliam v. Pulliam*, 10 Fed. 53; *Brown's Bl. Com.* pp.

393, 394. We also realize that the property of the ward had originally but little protection. See Woerner, Am. Law of Guardianship, p. 3; 2 Bl. Com. 77. We realize, therefore, that both wards and creditors have privileges which formerly they did not enjoy; that is to say, the privilege of the use of the machinery of the county and probate courts for the protection of their property and property rights. We realize that the clause of the Magna Charta to the effect: "*Nulli vendimus, nulli negabimus aut differimus justitiam vel rectum,*" and which we have paraphrased in our Constitution, § 22, article 1, into: "All courts shall be open, and any man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay," has generally been construed not to prohibit the imposition of reasonable court costs, and was aimed rather against the selling of justice by magistrates themselves,—that is to say, bribery,—than the imposition of reasonable fees. See Northern Counties Trust v. Sears, 30 Or. 388, 35 L.R.A. 192, 41 Pac. 931; Harrison v. Willis, 1 Heisk. 46, 19 Am. Rep. 604; Townsend v. Townsend, Peck (Tenn.) 15, 14 Am. Dec. 722. We are quite satisfied, however, that prior to the adoption of the North Dakota Constitution the meaning had extended its original boundary, and that the provisions which are to be found in the Constitutions of all of the states were aimed not merely against the selling of justice by the magistrates, but by the state itself; in other words, that a free and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to everyone.

In answer, also, to the contention that the right of the creditor to participate in the estate by means of the machinery of the county court is a privilege which he did not originally enjoy, we may say that the right to redress in a very large number of cases may be equally considered so. Until the invention, indeed, of the writ of trespass upon the case in England, there were a very large number of wrongs for which no redress could be had in the courts. Such a fact, however, would, we believe, hardly justify an imposition of extra court costs or fees in such cases.

The petitioner, we believe, is, under any and all of the authorities, entitled to recover his money in the case at bar; that is to say, the amount paid in excess of the initial fee of \$5 and the amount expended

in publishing or serving notices. The fees in excess of these amounts, and which from the complaint we gather are all that are claimed in the action, were demanded of the plaintiff by an officer acting under color of law, and for public services which the plaintiff was entitled to have performed. The complaint discloses that they were paid under written protest, and under circumstances and at a state of the proceedings when a refusal to pay them and a resort to compel the performance of the duties by legal proceedings and without such payment, would have involved a delay which would have been injurious both to the estate and the third parties. Under such a condition of affairs, the payment was involuntary, and not voluntary. *Mearkle v. Hennepin County*, 44 Minn. 546, 47 N. W. 165; *State ex rel. McCurdy v. Nelson*, 41 Minn. 25, 4 L.R.A. 300, 42 N. W. 548; *Cook County v. Fairbank*, 222 Ill. 578, 78 N. E. 895; *Chicago v. Northwestern Mut. L. Ins. Co.* 218 Ill. 40, 1 L.R.A.(N.S.) 770, 75 N. E. 803; *Trower v. San Francisco*, 152 Cal. 479, 15 L.R.A.(N.S.) 183, 92 Pac. 1025; *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012; *State ex rel. Nettleton v. Case*, 39 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; *State ex rel. Mann v. Brophy*, 38 Wis. 413; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *Lewis v. San Francisco*, 2 Cal. App. 113, 82 Pac. 1106; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559; *St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator Co. v. Soucie)* 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212.

The judgment of the District Court is affirmed.

Supplemental Opinion.

BRUCE, J. The opinion which is filed in this case is a substituted opinion, the one first filed having been corrected so as to make it clear that only the fees and charges of \$5 for each \$1,000 or fraction thereof in excess of the first \$1,000 come within the constitutional inhibitions, and are held to be illegally required. We have made this correction as the result of an intervening petition for rehearing which was filed by the tax commission as *amicus curiæ*. All that we strike out of the statute, in short, are the following words: "And when the

value of said estate has been ascertained by the court, through the inventory and appraisement or upon hearing of same, as legally required, within thirty days after the issuance of letters testamentary, of administration or guardianship, the judge of said court shall require an additional fee to be paid from said estate into said county treasury, of \$5 for each and every one thousand dollars or fraction thereof [in excess of the first one thousand dollars] of value therein found, as shown by said inventory and appraisement." [Rev. Codes 1905, § 2589.] We find no fault with the remainder of the statute. We are quite satisfied, from the authorities and from an examination of the act, that the case is one in which the doctrine of "partial invalidity" may be applied, and that the clauses which are herein held invalid are not so essentially and inseparably connected in substance with the remainder of the act as to require a rejection of the whole statute. The rule is well established that where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter depending upon each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed the one without the other. See *Cooley*, Const. Lim. 7th ed. 246; *Hirschfeld v. McCullagh*, 64 Or. 502, 127 Pac. 541, 130 Pac. 1131.

We are satisfied that the initial fee of \$5, as well as the expenditures for publishing and sending out notices, can be sustained as reasonable court charges, being levied uniformly upon all estates. The right to require reasonable court fees, indeed, has been so generally conceded, that a discussion of the proposition hardly seems to be necessary. The imposition of such fees is not a denial or sale of justice, provided that they are uniform, are reasonable, and have a reasonable relation to the services rendered. See *Perce v. Hallett*, 13 R. I. 364; *Merrill v. Bowler*, 20 R. I. 226, 38 Atl. 114; *Northern Counties Trust Co. v. Sears*, 30 Or. 388, 35 L.R.A. 192, 41 Pac. 931; *State ex rel. Atty. Gen. v. First Judicial Dist. Judges*, 21 Ohio St. 11; *Lee County v. Abrahams*, 34 Ark. 166; *State ex rel. Williams v. Fogus*, 19 Nev. 247, 9 Pac. 123; *Comstock Mill & Min. Co. v. Allen*, 21 Nev. 325, 31 Pac. 434; *Baldwin v. Goldfrank*, 88 Tex. 249, 31 S. W. 1064, affirming 9 Tex. Civ. App. 269; 26 S. W. 155; *State ex rel. Atchison & N. R. Co. v. Lan-*

caster County, 4 Neb. 537, 19 Am. Rep. 641; State ex rel. Hamilton County v. Ream, 16 Neb. 681, 21 N. W. 398; Beebe v. Wells, 37 Kan. 472, 15 Pac. 565; State ex rel. Bell v. Frazier, 36 Or. 178, 59 Pac. 5.

The same is true of § 2589, Rev. Codes 1905, being chapter 87 of the Laws of 1905, and of chapter 127 of the Laws of 1913, and in so far as the fee or charge of \$5 for each and every \$1,000 or fraction thereof in excess of the first thousand dollars is concerned. Chapter 66 of the Laws of 1903, and § 2071 of the Rev. Codes of 1899, being chapter 50 of the Laws of 1890, however, are invalid even as to the initial fee of \$5, as such is not imposed upon all estates equally, but according to the value thereof. They are necessarily equally invalid as to the added fee of \$5 for every \$1,000 additional value. These acts are not strictly before us, but we mention the same in order that no confusion of administration may arise from this opinion.

IN RE APPLICATION OF FRANK HENDERSON FOR WRIT OF HABEAS CORPUS.

(51 L.R.A.(N.S.) 328, 145 N. W. 574.)

Suitors — witnesses — foreign state — exemption from civil process — privilege — courts of this state — reasonable opportunity to return to their own state — nonresident defendant — criminal action — good faith.

1. The common-law privilege exempting suitors and witnesses, residents of a foreign state, in civil cases, on their claim of privilege, from service of civil process while in attendance as civil suitors or witnesses in the courts of this state, until after a reasonable opportunity afforded them to return to their abode, does not include nonresident defendants in criminal proceedings, temporarily here to defend in the criminal action against them, when the criminal proceedings are prosecuted in good faith, and not fraudulently instituted mere-

Note.—The authorities on the right of a nonresident to exemption from service of process while within a jurisdiction pursuant to condition of bail bond are reviewed in a note in 27 L.R.A.(N.S.) 333. As to the privilege from suit of a nonresident party attending as a witness, generally, see note in 25 L.R.A. 727. And upon the exemption of a nonresident party from service of civil process while in state in connection with case, see note in 42 L.R.A.(N.S.) 1101. See also note in 76 Am. St. Rep. 534.

ly for the purpose of procuring the presence of the foreign resident that he might be here served with civil process.

Nonresident defendant — criminal action — privilege — law gives none — arrest and bail — opportunity to return.

2. To a nonresident defendant in a criminal case the law extends no such privilege, and he may while here be served with a summons and complaint and arrested under bail and arrest proceedings, an incident to such civil action, and held to civil bail without there being afforded him any opportunity to return to his home in the foreign state.

Opinion filed February 17, 1914.

Application of Frank Hendersen, held on bail and arrest proceedings, for writ of habeas corpus. After full hearing the writ is denied and the petitioner remanded to custody.

Wolfe & Schneller and E. S. Carey, for petitioner.

On the question of intention we must strongly rely upon the declarations of the party, though they are not conclusive. *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 539; *State ex rel. Hat-tabaugh v. Boynton*, 140 Wis. 89, 121 N. W. 887, 17 Ann. Cas. 618.

A prisoner extradited from another state is privileged from arrest on civil process during the pendency of the prosecution of the crime for which he was extradited, *and* until a reasonable opportunity has been afforded him, after such trial, to return to the jurisdiction from which he was extradited. *Murray v. Wilcox*, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; *Re Cannon*, 47 Mich. 481, 11 N. W. 280; *Weale v. Clinton Circuit Judge*, 158 Mich. 563, 123 N. W. 31; *Compton v. Wilder*, 40 Ohio St. 130; *White v. Marshall*, 13-23 Ohio C. C. 376; *Moletor v. Sinnen*, 76 Wis. 308, 7 L.R.A. 817, 20 Am. St. Rep. 71, 44 N. W. 1099; *Small v. Montgomery*, 23 Fed. 707; *Juneau Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582; *United States v. Bridgman*, 9 Biss. 221, Fed. Cas. No. 14,645; *Blair v. Turtle*, 1 McCrary, 372, 5 Fed. 394; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582; *Compton v. Wilder*, 40 Ohio St. 130; *People ex rel. Watson v. Detroit Superior Judge*, 40 Mich. 730; *Re Cannon*, 47 Mich. 482, 11 N. W. 280; *Baldwin v. Branch Circuit Judge*, 48 Mich. 525, 12 N. W. 686; *Jacobson v. Hosmer*, 76 Mich. 234, 42 N. W. 1110; *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549; *Chubbuck v.*

Cleveland, 37 Minn. 466, 5 Am. St. Rep. 864, 35 N. W. 362; Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210; Wanzer v. Bright, 52 Ill. 35; Williams v. Reed, 29 N. J. L. 385; Hill v. Goodrich, 32 Conn. 588; State ex rel. Brown v. Stewart, 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429.

The immunity from service of civil process, of a witness while attending a trial in a state not his place of residence, is universally recognized. Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549; Mitchell v. Huron Circuit Judge, 53 Mich. 541, 19 N. W. 176; Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Mullen v. Sanborn, 79 Md. 364, 25 L.R.A. 721, 47 Am. St. Rep. 421, 29 Atl. 522; Bishop v. Vose, 27 Conn. 1; Wilson Sewing Mach. Co. v. Wilson, 22 Fed. 803, 51 Conn. 595; Baldwin v. Emerson, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83; Ellis v. Degarmo, 17 R. I. 715, 19 L.R.A. 561, 24 Atl. 579; First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308; Shaver v. Letherby, 73 Mich. 500, 41 N. W. 677; Fisk v. Westover, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961; Re Healey, 53 Vt. 694, 38 Am. Rep. 713; Andrews v. Lembeck, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483; Matthews v. Tufts, 87 N. Y. 568; Wilson v. Donaldson, 117 Ind. 356, 3 L.R.A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; Halsey v. Stewart, 4 N. J. L. 367.

This immunity is intended to shield the party from litigating a case in a jurisdiction into which plaintiff had no right to bring him. Thornton v. American Writing Mach. Co. 83 Ga. 288, 20 Am. St. Rep. 320, 9 S. E. 679; Freeman, Judgm. § 296, note to Mullen v. Sanborn, 25 L.R.A. 721; Wilson v. Donaldson, 117 Ind. 356, 3 L.R.A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; Fisk v. Westover, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961.

The relator is entitled to a writ of habeas corpus, and his imprisonment may be inquired into by such writ. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598; Wood v. Neale, 5 Gray, 538; Com. v. Huggefords, 9 Pick. 257; Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Ex parte M'Neil, 6 Mass. 245; Mullen v. Sanborn, 25 L.R.A. 735, note; Mitchell v. Huron Circuit Judge, 53 Mich. 542, 19 N. W. 176.

Purcell, Divet, & Perkins and *W. S. Lauder*, for Frank Budock, sheriff in custody of the petitioner.

The proceeding in which the order of arrest was issued belongs to that class of actions in which arrest and bail may be invoked. In such a case, on habeas corpus, the lawfulness of the arrest and imprisonment will be inquired into *only* to ascertain if the court had jurisdiction. State ex rel. Mears v. Barnes, 5 N. D. 350, 65 N. W. 688; Mullen v. Sanborn, 79 Md. 364, 25 L.R.A. 734, 47 Am. St. Rep. 421, 29 Atl. 522; Worth v. Norton, 76 Am. St. Rep. 542, note; State ex rel. Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541; State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N. W. 548; State v. Floyd, 22 N. D. 183, 132 N. W. 662; Ex parte McCullough, 35 Cal. 97; State v. Pratt, 20 S. D. 440, 107 N. W. 538, 11 Ann. Cas. 1049.

The remedy of habeas corpus can only be invoked when there is no other remedy. 21 Cyc. 285; Ex parte Walpole, 85 Cal. 362, 24 Pac. 657; State ex rel. Nixon v. Second Judicial Dist. Ct. 14 Mont. 396, 40 Pac. 66; Re Lancaster, 137 U. S. 393, 34 L. ed. 713, 11 Sup. Ct. Rep. 117; Bass v. Hightower, 94 Ga. 602, 21 S. E. 592; Ex parte Wilson, 6 Cranch, 52, 3 L. ed. 149.

The proper place to question the validity of an arrest, under the arrest and bail statute, where the security of the defendant's body is involved, is in the court where the action is pending. Southworth v. Resing, 3 Cal. 377.

It is generally held that a person is not privileged from arrest while in custody under criminal process, or, while attending or returning from his trial, on a *criminal charge*. 3 Cyc. 923; 1 Am. & Eng. Enc. Law, 724; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470; Scott v. Curtis, 27 Vt. 762; Wood v. Boyle, 177 Pa. 620, 55 Am. St. Rep. 747, 35 Atl. 853; Browning v. Abrams, 51 How. Pr. 172; Reid v. Ham, 54 Minn. 305, 21 L.R.A. 232, 40 Am. St. Rep. 333, 56 N. W. 35; Rutledge v. Krause, 73 N. J. L. 397, 63 Atl. 988; White v. Underwood, 125 N. C. 25, 46 L.R.A. 706, 74 Am. St. Rep. 630, 34 S. E. 104; Re Walker, 61 Neb. 803, 86 N. W. 513, 12 Am. Crim. Rep. 343; Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 27 L.R.A.(N.S.) 333, 134 Am. St. Rep. 886, 90 N. E. 962; Ex parte Flack, 88 Kan. 616, 47 L.R.A.(N.S.) 807, 129 Pac. 541.

Goss, J. One Frank Hendersen has petitioned this court for a writ of habeas corpus. As grounds for the writ, proof by affidavits has been submitted, establishing that from August 1st to December 25th last

Hendersen was a resident of Richland county in this state, and an employee of the Fairmount & Veblen Railway Company, a corporation. That on December 10th a criminal complaint charging embezzlement, a felony, was laid before a magistrate of said county, charging Hendersen with the commission of said crime, upon which a warrant for his arrest was duly issued. He was arrested thereon, and pending examination was held in \$4,500 bail, which he furnished. That on December 25th Hendersen changed his residence to Minneapolis, Minnesota. This is proven by his own affidavit and those of residents of Minneapolis. That on said date he rented apartments in that city, to which he has moved his personal belongings, and where he has taken up his abode and at which place he claims to be actually residing. Although the opponents to the granting of this writ claim this residence to be merely colorable, and for the purpose of gaining some temporary advantage in these legal proceedings, and have offered affidavits tending in part to contradict the defendant's statements as to residence and to impeach his good faith, we find in favor of the petitioner on this question of fact under the proof and presumptions of law thereto applying; and find that on December 25th last the petitioner did change his residence from North Dakota to Minneapolis, Minnesota, and that on the date of this petition he was and now is a bona fide resident of Minnesota. Petitioner has returned from Minnesota without extradition for the sole purpose of defending the criminal charge of embezzlement so pending against him until the courts of this state since December 10, 1913, at all times until January 17, 1914, on which last date, after a preliminary examination lasting over two weeks, defendant was held for trial before the district court upon a charge of felony, which trial, according to the showing made, will probably take place at the coming term of district court to be held in June of this year. In holding defendant for trial the examining court has found the existence of probable cause to believe that felony has been committed and that the defendant is guilty thereof. He was so held in \$4,500 bail pending trial, and has furnished a cash deposit in lieu of and as a bond in said amount for his appearance to answer said charge at the next term of the district court for Richland county.

After issuance of an order discharging him on bail approved, and about one minute after his release on bail, and while he was still in

the court room of the magistrate taking bail, he was served with a summons, complaint, and order for arrest on bail and arrest proceedings in an action wherein the corporation procuring his arrest for embezzlement is plaintiff and the petitioner is defendant. The order upon arrest and bail issued out of the district court of Richland county, directing that this petitioner be held in custody until he shall give bail on said order in the sum of \$5,000, as provided by law. The proceedings upon bail and arrest are in proper form and the order of arrest and bail issuable in such an action. Petitioner is imprisoned in default of bail. Without moving to vacate the service or the proceedings, he made application to the district judge of the district in which he was confined for the issuance of a writ of habeas corpus, which was denied after full hearing on the merits. He here contends to be illegally restrained of his liberty, alleging that as a citizen of Minnesota he is privileged from arrest in attending upon trial of the criminal action against him pending in the courts of this state, and not subject to interference by arrest upon mesne process during the time of his attendance and until a reasonable time afforded him to return to Minnesota. This is the issue presented.

We have no statute bearing upon or controlling this situation. Had petitioner been in attendance as a witness or suitor in the civil courts of this state, as a citizen of Minnesota or any foreign state, he would be privileged and therefore exempt upon his claim of privilege from legal service in a civil suit (*Hicks v. Besuchet*, 7 N. D. 429-443, 66 Am. St. Rep. 665, 75 N. W. 793), or from arrest in arrest and bail proceedings, which are merely ancillary to the civil action of which the arrest and bail is but an incident. Of the existence of this general privilege there is no question. Under the common law to avail such privilege must be claimed.

But petitioner is before us in a case in which the reasons for this common-law privilege so applying in civil cases are entirely absent. As a suitor or witness in a civil case he could not be compelled to attend or to submit himself to the jurisdiction of our courts. And his entering the state must be voluntary, either to aid others by voluntarily appearing or testifying in their behalf, or to defend his own interests and voluntarily submit his cause to our courts for arbitrament. In either case the common law, on grounds of public policy, has privileged him from harassment of civil proceedings, the interests of justice and public

policy demanding it, and has thus encouraged the voluntary appearance of the nonresident, who is under no compulsion to appear, to disclose, or to litigate in a civil case in our courts. In either or any event he is voluntarily aiding in the administration of justice. But where the party served has been brought under extradition proceedings, or by force of criminal process, from the foreign state into ours, to her answer for crime committed within our boundaries, if at all, the defendant is not voluntarily here. He has no choice in the matter. He is rendering organized society no service. Instead, he is here charged with being a menace to it. While presumed innocent, he is not fulfilling any office of good citizenship nor voluntarily promoting justice. And except in sham criminal proceedings, wherein the criminal process is made a mere pretense upon which to perpetrate a fraud upon a defendant by procuring his involuntary attendance, not with the bona fide intent of his being criminally prosecuted, but instead to secure service of a summons or process in a civil suit upon him, the criminal proceedings being but an instrument used for the collection of a debt, the reasons upon which the common-law exemption is given to a civil suitor or witness are mostly, if not altogether, absent. The question before us is whether such privilege accorded the civil suitor or witness shall be extended, regardless, of nonexistence of reason, to cover the case of this petitioner, who, when served, was here as a criminal defendant, and as such, on principle, should have no privilege.

Such proceedings are often discussed in connection with the law applying to extradition. This petitioner is to be treated in all respects as though he had been extradited, and the fact that he is here without having been extradited is no circumstance against him. Assuming that he had been extradited instead of appearing voluntarily to protect his bail, he could have been prosecuted for any criminal offense other and wholly independent of the alleged crime on which he was extradited, provided that such extradition was from another state of this Union, and not from a foreign country, in which latter case an immunity guaranteed by treaty would then be violated. *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539, and note. As between the states of this Union there is no such immunity. *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687, affirming 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945. The object

of our extradition laws, as between states, is not to afford any refugee or fugitive any personal privilege or immunity whatever; neither is it their intent nor purpose that any state shall, as to the extraditing state, be considered as an asylum for a fugitive from justice. Thus theories of personal immunity or privilege because of this defendant's residence in another state, as appear in the reasoning of some courts as a foundation for so-called public policy invoked by petitioner, or wherein extradition between states is treated as analogous to extradition from a foreign country under treaty rights, should not on principle be considered. Such precedent, exaggerating the rights of a defendant in extradition, consistently announces generally a rule contrary to our conclusions on the merits. From a standpoint of number of cases alone, petitioner would be entitled to the writ prayed for, but the early precedent seems to have applied the common-law privilege of suitors and witnesses in civil cases indiscriminately to criminal defendants, without distinguishing or apparently observing the want of grounds therefor. There seems to be a well-marked tendency in those courts not irrevocably committed to the extension of said privilege to criminal defendants, to deny it as to them. What we believe to be the weight of recent authority is to that effect, and recognizes the want of reason for adherence to the early rule. When the reason for the rule fails the rule itself should fall, is the statute of our state as well as the course dictated by common sense.

It may be urged that these proceedings in arrest and bail may interfere with the right of this defendant to make his defense in the criminal prosecution, a plausible and for the moment appealing circumstance that admittedly may be the result. But had the defendant remained a resident of this state, as he concededly was at the time of any commission of this offense for which he is held for trial, he would have been subject to arrest and imprisonment on mesne civil process. On the contrary, had he then been a resident of Minnesota and been extradited here, he would have been subject to prosecution for any criminal offense, and to which further criminal prosecutions might have been added, the result of which might have been to equally hamper him in his first defense. Such subsequent prosecution would have violated no rule of comity between states, as the state of Minnesota has no inter-

est in shielding either a refugee from this state, or one domiciled within its borders, from amenability for crimes here committed. To recognize any such rule as contended for would be contrary to the whole theory of the extradition laws.

It has been argued that to permit these proceedings may cause the executive of a foreign state to deny extradition in meritorious cases. The granting of extradition is intrusted to the chief executive of the state. He may, and oftentimes does, assume the right he does not under the spirit of the extradition laws possess, to pass upon the real merit of the prosecution. He may assume a given case to be an abuse of process, and deny extradition, the equivalent of holding that the courts of the extraditing state will permit an abuse of their process. Nor is it the duty of an executive to refuse rendition under extradition under a plea of protection of the property rights of the fugitive, as must be the case should such grounds be considered in passing upon requisition. Had this defendant been extradited, the foreign executive should not be concerned with whether the fugitive if rendered on extradition would thereafter be served with civil process, with perhaps bail and arrest proceedings as an incident thereto. The courts here are, as the courts there would be, amply able to see that fraudulent use is not made of criminal process to obtain extradition merely for the purpose of mulcting by subsequent civil proceedings the party so prosecuted. This duty is entrusted to the courts, and the rule is well established that in such cases of fraud the defendant will be regarded, and his rights measured, as though he had not come within the jurisdiction, the court not permitting its process to be used to perpetrate a fraud upon him in getting him here. This question has not been raised in this case except as it incidentally appears from the single fact that the corporation procuring his criminal prosecution is the plaintiff in the civil action. That such plaintiff made use of criminal process to obtain petitioner's presence here, that he might then be served with civil process, is wholly negatived by the fact that at the time of the laying of the criminal complaint, and for two weeks thereafter, including the time of his arrest, he was a resident and householder of Richland county, where he and his wife were residing. Had the corporation plaintiff desired to serve a civil process, it could have done so without

employing the aid of any criminal prosecution. No principle of extradition is violated by a denial of privilege, available in civil proceedings, to petitioner here as a defendant in a criminal case.

Any extended quotation from the authorities is needless. We must choose between two opposing lines of authority. Our holding is in line with the following:

Netograph Mfg. Co. v. Scrugham, 27 L.R.A.(N.S.) 333, and note, 197 N. Y. 377, 134 Am. St. Rep. 886, 90 N. E. 262; *Bank of Metropolis v. White*, 26 Misc. 504, 57 N. Y. Supp. 460; *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470; *White v. Underwood*, 125 N. C. 25, 46 L.R.A. 706, 34 S. E. 104; *Mullen v. Sandborn*, 79 Md. 364, 25 L.R.A. 721, 47 Am. St. Rep. 421, 29 Atl. 522; *Reid v. Ham*, 54 Minn. 305, 21 L.R.A. 232, 40 Am. St. Rep. 333, 56 N. W. 35; *Scott v. Curtis*, 27 Vt. 762; *Wood v. Boyle*, 177 Pa. 620, 55 Am. St. Rep. 747, 35 Atl. 853, and note in 38 Am. Rep. at page 720; *Re Walker*, 61 Neb. 803, 86 N. W. 513, 12 Am. Crim. Rep. 343; *Rutledge v. Krauss*, 73 N. J. L. 397, 63 Atl. 988; *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539; and the earlier New York cases of *Williams v. Bacon*, 10 Wend. 636; *Browning v. Abrams*, 51 How. Pr. 172; and *Lucas v. Albee*, 1 Denio, 666; 23 Century Dig. Extradition, § 53; Decen. Dig. same title §§ 41, 42, 19 Cyc. 98. The trend of recent decisions is well illustrated in *Re Flack*, decided a year ago by the supreme court of Kansas, and reported in 88 Kan. 616, 47 L.R.A. (N.S.) 807, 129 Pac. 541, where that court expressly overruled *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918, in principle analogous to that we are asked by petitioner to adopt, while *Re Flack* is analogous in principle to our holding that a defendant extradited from another state comes without privilege from arrest in a civil suit.

For contrary holdings, see *Murray v. Wilcox*, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; *Moletor v. Sinnen*, 76 Wis. 308, 7 L.R.A. 817, 20 Am. St. Rep. 71, 44 N. W. 1099, which case could have been disposed of as one of fraudulent requisition to obtain service in civil proceedings; the same with *Re Cannon*, 47 Mich. 481, 11 N. W. 280. See also *Martin v. Bacon*, 76 Ark. 158, 113 Am. St. Rep. 81, 88 S. W. 863, 6 Ann. Cas. 336; *State ex rel. Hattabaugh v. Boynton*, 140 Wis. 89, 121 N. W. 887, 17 Ann. Cas. 618; *Compton v. Wilder*, 40 Ohio St. 130. The citations on both sides of this question

might be multiplied, but the notes to these reports cite numerous authorities.

We are satisfied that the common-law privilege that would protect this petitioner from arrest under civil process, had he been attending the courts of this state as a witness in a civil or criminal case, or as a suitor in a civil suit, should have no application where he is here as a defendant in a criminal prosecution. The writ is therefore denied.

STATE OF NORTH DAKOTA v. LLOYD LESH.

(145 N. W. 829.)

Jury — impanelling — challenge — “state of mind” — court — discretion — abuse of — juror — evidence.

1. Although § 9972, Rev. Codes 1905, permits a challenge for cause “for the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging,” it is no abuse of such discretion for the trial court to disallow a challenge for cause which is interposed for the reason that a juryman states upon his *voir dire* that the fact that a man was arrested and brought before the jury to be tried might indicate to his mind that “there was something in it;” and where the juror qualifies his statement by saying that if selected as a juror he will try the case entirely on the evidence which he gets from the witness stand, and on the evidence alone.

Error — challenge to juror — judgment — juror did not participate — peremptory challenge.

2. Error in refusing to sustain a challenge for cause does not justify the reversal of a judgment where the juryman did not in fact participate in the trial, and the defendant did not exhaust all of his peremptory challenges.

State’s attorney — prosecution — violation prohibition law — county court — preliminary hearing not necessary — depositions.

3. A state’s attorney may commence a prosecution in the county court for a violation of the liquor laws of North Dakota, by the filing of an information which is properly verified, alone, and without a preliminary state’s attorney’s examination, and the mere fact that he may have conducted such preliminary examination does not make it necessary for him to file the depositions and testimony there taken, together with the names of the witnesses there present.

Information — criminal complaint — crime charged — commission of — verification.

4. An information is sufficient which has attached to it an affidavit in the form of a criminal complaint sworn to positively, wherein facts are stated showing the commission by the appellant of the crime charged, even though the affidavit is not entitled in any court, there being no controversy as to the genuineness of the affidavit, and the information itself being verified by the state's attorney in conformity to the statute.

Information — keeping liquors for sale as a beverage — sufficiency — date — duplicity.

5. An information for keeping intoxicating liquors for sale as a beverage contrary to the provisions of the laws of North Dakota, and which states that "heretofore, to wit, at various and sundry times between the 1st day of April, 1912, and on the 30th day of November, 1912, in the county of Benson in said state of North Dakota, one Lloyd Lesh, late of said county of Benson and said state of North Dakota, did commit the crime of keeping intoxicating liquors for sale as a beverage, committed as follows, to wit, that at said time and place the said Lloyd Lesh did wilfully, wrongfully, and unlawfully keep intoxicating liquors for sale as a beverage," etc., sufficiently charges the offense of keeping intoxicating liquors for sale as a beverage, and is not defective in that it fails to specify the date on which the crime was committed, nor is it void for duplicity.

Offense — committed between certain dates — continuing offense — acquittal — bar to further action as to time stated.

6. The offense of keeping intoxicating liquors for sale which is charged as being committed between certain dates is a continuing offense as to such time, and an acquittal under such an information will be a bar to a subsequent prosecution for a sale as a beverage within such dates.

Error — instructions — failure of defendant to testify — presumption.

7. It is not error for a court to fail to instruct the jury that the defendant's neglect to go upon the witness stand does not create or raise any presumption of guilt against him, where such an instruction is not requested by the defendant himself.

Instructions — druggist's permit — error — keeping liquors for sale as a beverage — jury — presumption as to law.

8. One charged with the offense of keeping intoxicating liquors for sale as a beverage is not necessarily guilty of such a crime because he has neglected to comply with the technical requirements of the druggist's permit act, nor can a jury be presumed to know the terms and requirements of that act. An instruction, therefore, is erroneous in a prosecution for keeping intoxicating liquors for sale as a beverage, which in substance instructs the jury that if they find that the defendant has sold at all, or in a manner not in conformity with

his rights under his druggist's permit, then they will be warranted in finding him guilty of the crime of keeping intoxicating liquors for sale as a beverage.

Jury — not presumed to know requirements of a criminal statute — instructions necessary — issues.

9. A jury will not be presumed to be acquainted with the provisions of a criminal statute. They should, therefore, be instructed in relation thereto when the same are in any way pertinent to the issues involved.

Opinion filed February 17, 1914.

Appeal from the County Court of Benson County, *Liles, J.*

Criminal information for keeping intoxicating liquors for sale as a beverage. Defendant convicted. Defendant appeals.

Reversed.

Statement by BRUCE, J.

Defendant was convicted of the offense of keeping intoxicating liquors for sale as a beverage contrary to the provisions of the statute, and has appealed to this court both from the judgment and from the order denying the motion for a new trial.

Flynn & Traynor, for appellant.

The challenge to the juror Anton Engen should have been allowed, and its denial was prejudicial to defendant. Rev. Codes 1905, § 9972, subdiv. 2.

An information or indictment which charges the crime to have been committed on sundry dates between two given dates, and failure to allege any *specific* date, is fatally defective. *State v. Beaton*, 79 Me. 314, 9 Atl. 728; 22 Cyc. 319, and cases cited; 10 Enc. Pl. & Pr. 517; 23 Cyc. 216, 227, 240; *State v. O'Donnell*, 81 Me. 271, 17 Atl. 66, 8 Am. Crim. Rep. 390; *State v. Pischel*, 16 Neb. 490, 20 N. W. 848.

Such an information *implies* at least the commission of two or more distinct offenses, and is duplicitous. 23 Cyc. 218; N. D. Code, § 9851.

The instructions to the jury told them, in effect, that if they found that defendant sold liquor *at all*, they should find him guilty. The *gist* of the charge is, "keeping of the liquor for *sale as a beverage*." 2 McClain, Crim. Law, § 1253; *Arrington v. Com.* 10 L.R.A. 247, note.

Such instructions are erroneous and prejudicial, and were not *cured*

by any other instructions. *State v. Williams*, 14 N. D. 411, 104 N. W. 546; *State v. Seelig*, 16 N. D. 177, 112 N. W. 140; *State v. Kruse*, 19 N. D. 208, 124 N. W. 385.

The court did not instruct the jury that the defendant's neglect to go upon the witness stand should not create any presumption against him, or be considered by the jury. Such omission was error. *State v. Currie*, 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875; *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907; *State v. Myers*, 8 Wash. 177, 35 Pac. 580, 756.

Andrew Miller, Attorney General, and *Torger Sinnes*, Special Prosecuting Attorney, for respondent.

The juror Engen's unequivocal statement that he could and would try the case entirely on the evidence, fairly and impartially. There is no merit in defendant's challenge. *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482; *State v. Werner*, 16 N. D. 83, 112 N. W. 60; *State v. Fujita*, 20 N. D. 555, 129 N. W. 360, Ann. Cas. 1913A, 159.

But Engen did not sit on the jury, and defendant did not exhaust all his challenges. *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. Goetz*, 21 N. D. 569, 131 N. W. 514.

The depositions taken by the state's attorney did not need to be filed in this case. *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460.

The filing of the information in county court was all that was necessary. Laws of 1909, chap. 80, § 33; *State v. Gottlieb*, *supra*.

The warrant of arrest was not issued upon the affidavit alone, but upon the information of the state's attorney with the affidavit attached. Laws of 1909, chap. 80, § 35; Code, § 9383.

The allegations in the information as to the *time* of the offense are sufficient, because the crime charged was a *continuing* one, if any. 22 Cyc. 313, 315.

The jury should not be instructed as to the *facts* in the case. *State v. Seelig*, 16 N. D. 177, 112 N. W. 140; *State v. Williams*, 14 N. D. 411, 104 N. W. 546.

BRUCE, J. (after stating the facts as above). The first ground urged for a reversal (but which we believe was abandoned upon the oral argument) is that "the court erred in denying the defendant's challenge to the juror Anton Engen." Engen, on his *voir dire*, said: "I said

that the fact that the defendant had been brought in here by the state's attorney charged with the commission of an offense might be such as to make me believe that there must be something in it or he would not be arrested, and it would take evidence to prove to me that he was not guilty, and until that evidence was proven to me I suppose I would still have that opinion. I said that the fact that the man was arrested and brought in here before the jury to be tried might indicate to my mind that there might be something in it. If selected as a juror I could and I would try it entirely on the evidence which I got from the witness stand, and on the evidence alone. I don't mean to tell the court that just because a man is arrested I believe that he is guilty. I believe that a man is innocent until he is proven guilty, and if I were selected as a juror in this case I can and I will try the case on the evidence I get from the witness stand fairly and impartially. I said that if the defendant was brought in here on the information of the state's attorney that that might be some evidence in my mind that he must be guilty, or there might be some evidence against him." We can see no merit in this contention. Section 9972, Rev. Codes 1905, it is true, permits a challenge for cause "for the existence of a state of mind on the part of the juror in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging." It is to be noticed, however, that by the terms of the act a sound discretion is allowed to the trial judge, and that in the exercise of such discretion he must be satisfied that the juror cannot try the issue impartially. We can see no abuse of discretion in this case. The juror simply stated what ninety-nine out of a hundred jurymen would state if they told the truth or understood the questions which were asked them. He followed his statement as to the impression made on his mind by the fact of the arrest by the positive and unequivocal statement and promise that he could and would try the case upon the evidence alone that he got from the witness stand, and fairly and impartially. Under the authorities, it was a matter for the sound discretion of the trial court, and we can find no abuse of such discretion. *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482; *State v. Werner*, 16 N. D. 83, 112 N. W. 60; *State v. Fujita*, 20 N. D. 555, 129 N. W. 360, Ann. Cas. 1913A, 159. It is also to be noted that in the case at bar

the juror was excused and did not participate in the trial, and that the defendant did not exhaust all of his peremptory challenges. Under such circumstances this court has held, and still holds, that error in refusing to sustain a challenge will not justify a reversal of a judgment. *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. Goetz*, 21 N. D. 569, 131 N. W. 514.

Counsel for defendant and appellant next urges that there was not a sufficient complaint or information upon which to base the arrest of the defendant or to give the court jurisdiction over him. It is urged that the state's attorney proceeded under § 9368, Rev. Codes 1905, to subpoena witnesses and take their depositions, but that the depositions were not attached to the information, nor were they ever filed in the court. It is also urged that the affidavit signed by the complaining witness, Ira Thorne, was not entitled in any action or court. Though it was attached to the information of the state's attorney, this information, it is urged, was itself only verified on information and belief.

We do not believe that the fact that the state's attorney conducted a preliminary state's attorney's examination is in any way material. The fact that such was had did not preclude the state's attorney from commencing the action in the county court by the filing of an information merely. *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460; Rev. Codes 1905, § 9368. It was not, therefore, necessary for him to file the depositions. Under any view of the law, it was sufficient if there was filed with his information an affidavit in the form of a criminal complaint, sworn to positively, wherein facts were stated showing the commission by the appellant of the crime charged. See *State v. Gottlieb*, 21 N. D. 180, 129 N. W. 460. The affidavit in this case was as follows:

State of North Dakota }
County of Benson } ss.:

Ira Thorn, being first duly sworn, upon his oath deposes and says that one Lloyd Lesh kept intoxicating liquors for sale as a beverage in

Benson county, North Dakota, at various and sundry times between the 1st day of April, 1912, and the 30th day of November, 1912.

(Signed) Ira Thorn.

Subscribed and sworn to before me this 30th day of November A. D. 1912.

Torger Sinness, as States's Attorney in and for the County of Benson and State of North Dakota.

This affidavit was sufficient. It is sworn to positively. It is true that it was not entitled in any court, but it was attached to the information and filed. Its genuineness is not disputed, and if would be refining a refinement of technicality too far to hold that the mere fact of the omission of the court was material. The information itself appears to have been verified in conformity with the requirements of the statute. *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460.

It is argued, it is true, that the affidavit of Ira Thorn is not in any form a deposition, and merely states legal conclusions, and that there is nothing in it upon which to base a finding that a crime had been committed. We cannot, however, sustain this contention. It positively states that the defendant Lesh kept intoxicating liquors for sale as a beverage, etc. It is a statement of a fact as well as of a legal conclusion. It may be a conclusion of fact, but every use of the eyes and of the ears is such a conclusion. Affidavits of this kind are not required to go into the details of evidence.

It is next claimed that the information is fatally defective in that it does not allege any specific date on which the crime was committed, but that the crime, which was that of keeping intoxicating liquors for sale as a beverage, was committed "at various and sundry times between the 1st day of April, 1912, and the 30th day of November, 1912." It is urged that no specific date on which the crime was committed was alleged; that the information, therefore, practically means that for a time the defendant was guilty of keeping such liquor, for a time not; then again he kept it for sale, and then again was without it; that if it alleges any crime, it alleges a number of distinct violations of the law, and that the defendant, therefore, would have no way of knowing of which he has been convicted so as to bar a further prosecution. It is also urged that the information is duplicitous in that it includes a

number of distinct offenses of the same nature. At the same time, however, defendant's counsel admits that the crime of keeping intoxicating liquor for sale is in its nature a continuing offense, and that the information would have been good if it had alleged that the crime was committed on the 1st day of April, 1912, and "at various and sundry times thereafter."

We think there is no merit in the contention of counsel. It is to be remembered that we are not here dealing with the common law, or with the technical practice of the common law, but with a modern code of criminal procedure. All that our statutes seem to require is that an information shall be sufficiently clear and definite that it may be understood by an ordinary man. Rev. Codes 1905, § 9856. "The precise time at which the offense was committed need not be stated in the information or in the indictment, but it may be alleged to have been committed at any time before the filing thereof, if an information; or, if an indictment, before the finding thereof, except when the time is a material ingredient in the offense." Rev. Codes 1905, § 9852. "The information or indictment is sufficient if it can be understood therefrom; . . . That the offense was committed at some time prior to the time of the presenting of the information or of the finding of the indictment," and, "That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended," and, "that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case." Rev. Codes 1905, § 9856. In the case at bar time is not "a material ingredient in the offense." The offense is that of keeping intoxicating liquor for sale as a beverage, and in its nature is a continuing offense. In the case of *State v. Brown*, 14 N. D. 529, 104 N. W. 1112, we upheld an information which charged that the offense (of maintaining a liquor nuisance) was committed on the 1st day of January, 1904, "and on divers and sundry dates and times between that date and the 24th day of April, A. D., 1905, and on the 24th day of April, 1905." This allegation, we said, was "equivalent to a statement that the nuisance was maintained on the first and last days named and throughout the intervening period." We also held that it

was neither uncertain nor open to the objection that it implied that more than one continuous offense was committed. In the case of *State v. Stevens*, 19 N. D. 249, 123 N. W. 888, the information charged: "That heretofore, to wit, between the 1st day of October, 1908, and the 22d day of April, 1909, continuously, at the county of Nelson in said state of North Dakota, one C. H. Stevens . . . did commit continuously the crime of keeping and maintaining a common nuisance, committed as follows, to wit:" etc. We held in this case that the information charged that a continuing liquor nuisance was kept and maintained by the defendant during each day between the dates mentioned, and that the allegation was sufficiently specific as to time. We have thus held that the specific statement of a day certain is not necessary, and that the allegation that the offense was committed "at various and sundry times between" certain dates is not duplicitous. We now hold that after a conviction or acquittal under such an information, a defendant cannot be put on trial for the keeping of liquor for sale as a beverage within the dates specified, and, such being the case, he is granted all the protection that the common law afforded, for even though the common law may have required a specific date to be stated, it by no means limited the proof to that day. See *State v. Cofren*, 48 Me. 364; *Com. v. Chisholm*, 103 Mass. 213; *Com. v. Keefe*, 9 Gray, 290; *Com. v. Langley*, 14 Gray, 21.

There is even less merit in the contention that the court erred in failing to instruct the jury that the defendant's neglect to go upon the witness stand did not create or raise any presumption of guilt against him. It is true that the supreme court of Washington has held such omission to be error in *State v. Myers*, 8 Wash. 177, 35 Pac. 580, 756. The holding, however, was under a statute which specifically required such an instruction to be given, and, as far as we can learn, stands alone. This court held in the case of *State v. Dodson*, 23 N. D. 305, 136 N. W. 789, that the giving of an instruction was not error where the failure of the defendant to testify had been inadvertently referred to, and such reference was provoked or made necessary by counsel for defendant. We also positively held in the case of *State v. Currie*, 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875, and *State v. Wieniewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907, that it was not error for the court generally to so instruct the jury. We know

of no case where, in the absence of a statutory command or of a request by the defendant, the giving of such an instruction has been required.

We now come to the instructions of the court, and here we encounter some difficulty. It is claimed by counsel for defendant that in them the court entirely lost sight of the fact that the crime charged was that of *keeping intoxicating liquor for sale as a beverage*, and in effect charged the jury that they could find the defendant guilty if they found from the evidence that he sold intoxicating liquors at all, or sold them in violation of his druggist's permit, even though not as a beverage. A druggist, counsel says, either with or without a permit, might sell liquor for purely medicinal purposes, and could not be charged with selling it or *keeping it for sale as a beverage*, even though he violated his permit. He might, for instance, sell it as a medicine and fail to have the buyer sign the necessary affidavit. He would be violating the law, but would not be guilty of keeping it for sale as a beverage, which alone is the crime charged in the information in the case at bar. The court, counsel says, wholly failed in his instructions to use the qualifying terms, "as a beverage," in defining what constituted the crime. He claims that for these reasons the instructions constituted reversible error.

There is much force in this contention. The material portion of this instruction is as follows: "Gentlemen of the Jury: This is a criminal action. . . . The information charges the defendant, Lloyd Lesh, with the crime of keeping intoxicating liquors for sale as a beverage. It also charges the defendant, Lloyd Lesh, with keeping intoxicating liquors for sale as a beverage between the 1st day of April and the 30th day of November, 1912. The defendant plead not guilty when arraigned under the charge of this information. . . . I further instruct you that each of the material allegations of this information must be proven before you can find the defendant guilty as charged. I instruct you that the material allegations of the information are that the defendant kept intoxicating liquors for sale as a beverage between the 1st day of April, 1912, and the 30th day of November, 1912, and that the defendant kept intoxicating liquors for sale at divers and sundry times between those dates, in Benson county, North Dakota. I instruct you as to the manner in which the offense may be committed. If you find from the evidence, beyond a reasonable doubt, that the defendant *kept intoxicating liquors for sale* between the 1st day of April,

1912, and the 30th day of November, 1912, that at that time between those dates the *defendant sold intoxicating liquors*, then you would be warranted in finding the defendant guilty of the crime charged, to wit, keeping intoxicating liquors for sale *as a beverage*, contrary to law. I instruct you further that the evidence in this case discloses that the defendant is the proprietor or manager of a drug store in the town of Warwick, in Benson county, North Dakota, and that between the 15th day of November and the 30th day of November, the last day mentioned in the information, he was the holder of a druggist's permit, granted to the defendant, Lloyd Lesh, by the district court of Benson county, and I instruct you that if you find from the evidence that any liquors that the defendant may have kept between the dates, the 15th of November and the 30th day of November, or any liquors he may have had in store prior to that time, kept for the purpose and that purpose alone of selling in conformity with the druggist's permit granted to him on the 15th day of November, and for no other purpose, and if sales which were made between the 15th day of November and the 30th day of November were made in conformity with his rights and his druggist's permit, then you would not be warranted in finding the defendant guilty of the crime as charged. I further say to you that if you find the defendant kept intoxicating liquors for sale to be sold other than under his druggist's permit, or *did in fact make sale*, if you find, beyond a reasonable doubt, *other than in conformity with his druggist's permit*, then you should find the defendant guilty as charged in the information."

We are satisfied that the jury was not as clearly instructed as a proper administration of justice would require. It is true that the court is not required to instruct upon issues or facts which are foreign to the case. This, however, does not deprive a defendant of the right to be tried for the offense with which he is charged in the information, and one charged with keeping liquor for sale as a beverage should or could hardly be found guilty of such a crime on the mere proof that he has neglected to comply with the conditions of the druggist's permit in making a sale, or has sold under such permit, or has kept intoxicating liquors to be sold thereunder, unless he has actually kept or sold such liquors as a beverage. Defendant, in short, was not charged with any technical violation of the terms of his permit, but with *keeping intoxi-*

cating liquors for sale as a beverage. So, too, the instruction as to the druggist's permit is itself indefinite, and the instruction that the defendant could not be found guilty if after the 15th of November he sold in conformity with such permit was unintelligible. The state's attorney, no doubt, was acquainted with all of the druggist permit act and of the conditions contained in the permit itself, and we are all generally presumed to know the law. It is carrying the presumption, however, a little too far to make a man's liberty depend upon the existence of that knowledge in the minds of a jury. In instructing juries, indeed, we cannot presume that they have read and are conversant with all of our statutory enactments. Lawyers and judges even are not, in fact, so cognizant, and they need constantly to consult the books. Juries hardly can have a better opportunity for knowledge. The court in substance instructed the jury that if they found that the defendant had sold liquor at all, and in a manner not in conformity with his rights under his druggist's permit, then they would be warranted in finding him guilty of the crime of keeping intoxicating liquors for sale as a beverage. He absolutely failed to explain what the defendant's rights and duties under the druggist's permit were. The question presents itself as to whether a druggist who keeps alcohol for no other purpose than for medicinal and external uses must necessarily be found guilty of the crime of keeping it *for sale as a beverage*, merely because, in selling it on a prescription and for *medicinal purposes*, he has failed to take the required affidavit from the purchaser. In such a case, indeed, he may be guilty of violating the statute and may have committed a crime, but he has not committed the specific crime of keeping intoxicating liquors for sale as a beverage.

The judgment of the County Court is reversed, and the cause is remanded for further proceedings according to law.

STATE OF NORTH DAKOTA v. ARMOUR & COMPANY, a
Corporation.

(— L.R.A.(N.S.) —, 145 N. W. 1033.)

As early as chapter 72, Sess. Laws 1899, North Dakota has each year enacted legislation upon the subject of pure foods and honest weights and measures. The 1907 act provides that every package, bottle, or container should bear the true net weight of the product. Chapter 236, Sess. Laws 1911, provides that every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure, or numerical count, and labeled in accordance with the provisions of the laws of this state; that all weights shall be net, excluding the wrapper or container, and that every lot of lard, lard compound, or lard substitute, unless sold in bulk, shall be put up in pails or containers holding 1, 3, or 5 pounds net weight or some whole multiple of these numbers, and not any fraction thereof. Defendant is a corporation having packing houses in Chicago, Omaha, and other large cities, and maintaining a branch establishment in the city of Fargo, North Dakota, to which its goods are shipped in carload lots to be distributed therefrom. In October, 1911, the state food commissioner went to this branch establishment in Fargo and asked to purchase 3 pounds of lard. He was sold a pail containing 2 pounds and 6 ounces. The sale and the resultant arrest were made to test the constitutionality of the 1911 law. The defendant claimed that the law was unconstitutional for seven reasons, the first reason being subdivided into six parts.

Unconstitutional law — arbitrary — legislature — courts — interference — burden on person attacking law — beyond reasonable doubt — prejudice — profit to middleman — weights and measures.

1. Plaintiff's contention is that the law is unconstitutional because it is arbitrary, unreasonable, and not justified under the police powers of the state. (a) It is contended that the 1911 law was unnecessary because the 1907 law providing for the display of net weights was ample to protect the consumer against fraud. *Held*, that the legislature has primarily the choice of laws regulating weights, and the court will not interfere with this choice. The burden is upon the person attacking the constitutionality of the law to show beyond a reasonable doubt that the Constitution has been violated, that in the case at bar the defendant has failed in his proof, there being many reasons for the 1911 enactment. (b) It is contended that the law is unreasonable because

Note.—On the general question of the power to require weight of package to be indicated upon it, see note in 17 L.R.A.(N.S.) 684. And as to the constitutionality of discriminations in statutory regulations concerning food products, see note in 17 L.R.A.(N.S.) 650.

27 N. D.—12.

it interferes with a custom of the lard industry extending over a period of more than thirty years. *Held*, that this is no objection to the law. The fact that an abuse has existed for thirty years does not foreclose the state from an attempt to regulate the same. (c) It is contended that the law is unreasonable because it imposes an additional expense upon the packers. *Held*, upon an examination of the evidence, that this contention is not well founded. The defendant is already supplying a private firm with net-weight pails that would comply with the laws of North Dakota. No reason is shown why those pails could not be lithographed with the Armour brand and used in North Dakota. (d) It is further urged that the law is unnecessary and unreasonable because in any event the customers are not prejudiced. That they are paying merely the price of bulk lard plus the extra expense of the tin pails. *Held*, upon an examination of the evidence, that the consumer pays more than the mere cost of the container. This cost includes expensive advertising upon the pail itself, and a probable profit to the middlemen upon the cost of the pail as well as of the lard. (e) It is urged that the law is unreasonable as interfering with the regular custom of all trades, it being contended that butchers and grocers include the weight of the paper bag with the goods sold. *Held*, that even if true it furnishes no reason why laws should not be enacted to regulate this abuse. (f) It is contended that the enforcement of this law will drive the packers to use bulk lard only, to the detriment of the commodity. *Held*, that from the evidence, the packers never furnished over 40 per cent of the lard to the trade in this state, and this defendant furnishes but between 5 per cent and 10 per cent of the lard used, and even should it withdraw from the state it would not materially affect the lard industry. The authorities upon the subject of the control of weights and measures by compelling even weights in containers are collected in the opinion.

Constitutional guaranties — freedom of contract — equal protection — police power — private rights — public — protection.

2. The law of 1911 does not interfere with the guaranties of the Constitution relative to the right of freedom of contract and the equal protection of the law. Under the police power, the state can interfere with private rights when necessary to protect the public from fraud or the opportunity for fraud. Whatever injury one particular citizen may suffer is compensated to him by the general protection afforded him against other evils, by such police power.

Due process of law — taking of property without.

3. Said statute does not constitute the taking of property without due process of law.

Lard industry — other articles of food — fraud — sale of foods.

4. The claim of appellant that the lard industry is singled out from all articles of food, and subjected to regulation, is not supported by the evidence in this case. Every article of food or beverage, as well as ordinary articles of commerce, such as paints, formaldehyde, Paris green, etc., are regulated by

the same or similar acts. The 1911 law specifically mentions lard, lard compounds, and lard substitutes, and the manner of their regulation in pails, but this is a mere incident of the law. The object of the law is to prevent the opportunity for fraud in the sale of all articles of food.

Commerce clause — Federal Constitution — original package — sale local or intrastate.

5. The claim of the defendant that the law is in violation of the commerce clause of the Federal Constitution is not sustained. Congress has control of commerce between the several states, with foreign nations and among the Indian tribes, while the states have control over intrastate commerce. The pail of lard sold to the food commissioner was shipped into the state in a railway car, and was itself contained in a crate containing 20 similar pails. The original package was either the railway car or the crate, and had been broken prior to the sale. Thus the sale was a local or intrastate transaction. The cases upon this phase are collected in the opinion.

Interpretation — gross weights — repeal by judicial construction — courts.

6. It is contended by defendant that the act should be given a reasonable interpretation, thus permitting the sale of gross-weight pails if labeled with the net weight. *Held*, that the import of the law is plain, and that the construction required by the defendant would result in a repeal of the law by judicial construction, which this court will not do.

Congress — foods — weights — sale — intrastate — control of.

7. It is contended that Congress has assumed control of the field of pure foods and weights, and therefore the laws of North Dakota upon the subject have become ineffectual. Under the fifth paragraph of this opinion it is held that the sale in question was an intrastate transaction, entirely within the control of the state, and entirely outside of the control of the United States.

Upon consideration of the whole act it is held that the law is not unreasonable, and it in no manner prejudices the defendant, and is not in conflict with any of the enumerated provisions of the Constitution.

Opinion filed December 17, 1913. On petition for rehearing, February 17, 1914.

Appealed from the District Court of Cass County, *Pollock*, J.

Affirmed.

Watson & Young and *Alfred R. Union* and *Abram R. Stratton*, for appellants.

Every exercise of the police power must be *reasonable*. *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636,

6 Sup. Ct. Rep. 334, 388, 1191; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

While every reasonable presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution, rather than the lawmaking branch of the government. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501; *Marbury v. Madison*, 1 Cranch, 137, 176, 2 L. ed. 60, 73; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Plessy v. Ferguson*, 163 U. S. 550, 41 L. ed. 260, 16 Sup. Ct. Rep. 1138; *State v. Hanson*, 118 Minn. 85, 40 L.R.A. (N.S.) 865, 136 N. W. 412, Ann. Cas. 1913E, 405; *Freund, Pol. Power*, p. 60.

Section two of the law can be justified only on the basis that it is necessary to prevent fraud. It is in violation of the commerce clause of the Federal Constitution. *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431.

The object of the act in question is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food. *Re Wilson*, 168 Fed. 566; *Nave-McCord Mercantile Co. v. United States*, 104 C. C. A. 486, 182 Fed. 46; *United States v. American Druggists' Syndicate*, 186 Fed. 387; *United States v. 10 Barrels of Vinegar*, 186 Fed. 400; *Von Bremen v. United States*, 113 C. C. A. 296, 192 Fed. 904; *United States v. 75 Boxes of Alleged Pepper*, 198 Fed. 934.

It is well settled that the state may not, under the guise of police power, impose burdens upon or discriminate against interstate commerce, nor enact laws in conflict with the statutes of Congress. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Northern P. R. Co. v. Wash-*

ington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The classification contained in § 2 is arbitrary and without reason, and cannot be justified as a proper exercise of police power. *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Angell v. Cass County*, 11 N. D. 265, 91 N. W. 72; *Beleal v. Northern P. R. Co.* 15 N. D. 318, 108 N. W. 33, 20 Am. Neg. Rep. 453; *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. 690; *Re Connolly*, 17 N. D. 551, 117 N. W. 946; *State ex rel. Dorval v. Hamilton*, 20 N. D. 598, 129 N. W. 916; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511.

The limitation of legislative power to classify is that it shall be upon some reason suggested by necessity, or by a difference in the situation and circumstances of the different classes. *Cobb v. Bord*, 40 Minn. 479, 42 N. W. 396; *State ex rel. Oblinger v. Spaude*, 37 Minn. 322, 34 N. W. 164; *Sutherland*, Stat. Constr. § 127; *Cooley*, Const. Lim. 141; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 94, 49 N. W. 318; *Edmonds v. Herbrandson*, 2 N. D. 273, 14 L. R. A. 725, 50 N. W. 970; *State ex rel. Richards v. Hammer*, 42 N. J. L. 439; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. 690; *State v. Cougal*, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858.

If the statute is to be construed as forbidding the sale of lard in pails of any other than the size stated, it is an unreasonable and unlawful exercise of the police power, because it goes beyond the evil sought to be cured. *Chicago v. Schmidinger*, 243 Ill. 168, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182.

It is not fair to rely upon the early cases as justify this character of legislation. *Guillotte v. New Orleans*, 12 La. Ann. 432; *Mobile v. Yuille*, 3 Ala. 137, 33 Am. Dec. 441; *Paige v. Fazackerly*, 36 Barb. 392; *Buffalo v. Collins Baking Co.* 39 App. Div. 432, 57 N. Y. Supp.

347; *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; *Com. v. McArthur*, 152 Mass. 522, 25 N. E. 836; *Chicago v. Schmidinger*, 243 Ill. 168, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614; *State v. McCool*, 83 Kan. 428, 111 Pac. 477.

The exercise of the police power of the state is limited and prescribed. *Rochester v. West*, 29 App. Div. 125, 51 N. Y. Supp. 482; *Dill. Mun. Corp.* 3d ed. §§ 319, 320; *Ford v. Standard Oil Co.* 32 App. Div. 600, 53 N. Y. Supp. 48; *People v. Gillson*, 109 N. Y. 398, 4 Am. St. Rep. 465, 17 N. E. 343; *Slaughter-house Cases*, 16 Wall. 36, 106, 21 L. ed. 394, 418; *People v. Marz*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Buffalo v. Collins Baking Co.* 24 Misc. 745, 53 N. Y. Supp. 968; *Buffalo v. Hill*, 79 App. Div. 408, 79 N. Y. Supp. 449; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 105, 92 N. Y. Supp. 497; *People ex rel. Lodges v. Health Dept.* 117 App. Div. 864, 103 N. Y. Supp. 275; *Ex parte Dietrich*, 149 Cal. 104, 5 L.R.A.(N.S.) 873, 84 Pac. 770.

Arthur W. Fowler, State's Attorney, Cass County, *Andrew Miller*, Attorney General, *Alfred Zuger*, and *John Carmody*, for respondent, *Edward Engerud*, counsel for respondent.

The object of all net weight and measure laws is to circumvent the opportunity for practice of imposition upon buyers, which is always possible in sales of ready-made packages. *Freund*, Pol. Power, § 274; *Tiedeman*, Pol. Power, § 89; *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

"It would be more honest to charge the customer more for the tea than to make him pay for the wrapper." *Lane v. Rendall* [1899] 2 Q. B. 673, 69 L. J. Q. B. N. S. 8, 63 J. P. 757, 48 Week. Rep. 153, 81 L. T. N. S. 445, 16 Times L. R. 4.

Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond rational doubt. One branch of the government cannot encroach on the domain of another, without danger. The safety of our institution depends in no small degree on a strict observance of this salutary rule. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 563, 55 L. ed. 328, 337, 31

Sup. Ct. Rep. 259; *State v. Aslesen*, 50 Minn. 5, 36 Am. St. Rep. 620, 52 N. W. 220; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

The appellant does not deny that it is a proper exercise of police power to require lard and similar commodities, when not sold in bulk, but sold in packages or by the pail, to be sold in packages of fixed sizes. *Wheeler v. Russell*, 17 Mass. 258; *Eaton v. Kegan*, 114 Mass. 433; *State v. Pittsburg & C. Coal Co.* 41 La. Ann. 465, 6 So. 220; *Levy v. Gowdy*, 2 Allen, 320; *James v. Josselyn*, 65 Me. 138; *Richmond v. Foss*, 77 Me. 590, 1 Atl. 830; *McLean v. State*, 81 Ark. 304, 126 Am. St. Rep. 1037, 98 S. W. 729, 11 Ann. Cas. 72, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Com. v. McArthur*, 152 Mass. 522, 25 N. E. 836; *Mobile v. Yuille*, 3 Ala. 137, 33 Am. Dec. 441; *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; *Chicago v. Schmidinger*, 243 Ill. 168, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614; *State v. McCool*, 83 Kan. 428, 111 Pac. 477.

Such laws are enacted for the prevention of fraud and deception in trade and commerce, and are within the police power of the state. *People v. Girard*, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *People v. Luhrs*, 195 N. Y. 377, 25 L.R.A.(N.S.) 473, 89 N. E. 171; *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *Freund, Pol. Power*, 275.

The classification contained in § 2 of the law is reasonable, and cannot be said to be arbitrary in its application. *Paige v. Fazackerly*, 36 Barb. 392; *Rochester v. West*, 29 App. Div. 125, 51 N. Y. Supp. 482; *Buffalo v. Hill*, 79 App. Div. 402, 79 N. Y. Supp. 449; *People ex rel. Lodes v. Health Dept.* 117 App. Div. 856, 103 N. Y. Supp. 275; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

BURKE, J. As early as chapter 72, Session Laws of 1899, the legislature of the state of North Dakota enacted laws relative to pure foods and honest weights. This legislation covers almost every article of food,—beverages, Paris green, paints, formaldehyde, and other articles too numerous to mention. The weight of a bushel of every kind of grain is specified, as well as the size of a gallon, quart, pint, etc., in liquids. The sheriffs of the various counties are given authority to examine and test scales and measures, and confiscate those found to be false. Among other subjects regulated is lard. In 1905 an act was passed providing that all articles of food should be considered misbranded if the package, bottle, or container did not bear the true net weight, name of the real manufacturer or jobber, and the true grade or class of the product, the same to be expressed in clear and distinct English words in black type on a white background. In 1907 this act was re-enacted with a few changes, to read as follows: "If every package, bottle, or container does not bear the true net weight, the name of the real manufacturer or jobbers, and the true grade or class of the product, the same to be expressed on the face of the principal label in clear and distinct English words, in black type on a white background, said type to be in size uniform with that used to name the brand or producer" [chap. 195], the same is to be considered misbranded, etc. This article applied to all food products as well as lard.

Chapter 236, Sess. Laws 1911, reads as follows: [Section 1. Food sold by weight, measure or count.] "Every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure, or numerical count, and as now generally recognized by trade custom, and shall be labeled in accordance with the provisions of the food and beverage laws of this state. Only those products shall be sold by numerical count which cannot well be sold by weight or measure. All weights shall be net, excluding the wrapper or container, and shall be stated in terms of pounds, ounces and grains avoirdupois weight, and all measures shall be in terms of gallons of two hundred and thirty one (231) cubic inches or fractions thereof, as quarts, pints, and ounces. Reasonable variations shall be permitted and tolerations therefore shall be established and promulgated by the food commissioner. Section 2, weight of lard. *Every lot of lard or of lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers*

holding one (1), three (3), or five (5) pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. If the container be found deficient in weight additional lard, compound or substitute shall be furnished to the purchaser to make up the legal weight. The *face label* shall show the true name and grade of the product, *the true net weight* together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind as 'back lard' or 'intestinal lard.' Every lard substitute or lard compound shall also show, in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this state. [Section 3. Weight of Bread.] A loaf of bread for sale shall be two pounds in weight. Bread, unless composed in chief part of rye or maize, shall be sold only in whole, half, and quarter loaves and not otherwise. Bread, when sold, shall, upon the request of the buyer, be weighed in his presence and if found deficient in weight additional bread shall be delivered to make up the legal weight, except that this section shall not apply to rolls or to fancy bread weighing less than one quarter of a pound. Provided, every loaf, half loaf, quarter loaf or other loaf of bread which does not weigh the full legal weight required by this section when plainly labeled with the exact weight thereof, shall not be deemed in violation of the provisions of this act."

The defendant is a corporation, with packing houses in Chicago, Kansas City, Omaha, and other larger cities, doing a large business in the various lines incident to the packing trade. They maintain a branch establishment in the city of Fargo, in this state, in charge of a general manager. In October, 1911, Professor Ladd, state food commissioner, went to this establishment and asked to purchase 3 pounds of Armour's Shield Lard. He was sold a pail which is one of the exhibits in this case, and which admittedly contained 2 pounds, 6 ounces of lard. Upon complaint of the food commissioner, arrest was made under the provisions of the 1911 law. The purchase was made and the complaint filed with the direct object of testing the constitutionality of the law. The defendant admits the sale within the state of a single pail of lard, but urges that the law is unconstitutional and void in so far as it attempts to regulate the size of the pail, for six reasons given in the appellant's

brief in the following language: "Our contentions still are, and we urge them with all confidence: (1) That this law is arbitrary and unreasonable, and cannot be justified under the police power of the state. (2) That it interferes with the guaranties of the right of freedom of contract and of the equal protection of the law afforded by the Constitution. (3) That it constitutes the taking of property without due process of law. (4) That it is class legislation. (5) That it is in violation of the commerce clause of the Federal Constitution; and (6) that in no event under proper construction of the statute can a conviction be sustained." We will discuss these objections in the order named.

(1) The first contention is that the law is arbitrary, unreasonable, and not justified under the police power of the state. Thereunder appellant has advanced six arguments, and we will therefore subdivide this first subject, and discuss each of the reasons given under the designation of a letter of the alphabet. Before taking up those matters in detail a few general remarks may be useful. The lard sold in this instance was not adulterated, but misbranded under said statute, but the principles governing are identical. The questions of pure food and honest weights are inseparably allied, and any argument advanced upon one applies equally to the other. That the subject is well within the police power of the state is so well settled that it seems a waste of time to cite authorities at length, and we will therefore content ourselves with a few citations upon this general proposition. In the excellent work of Thornton on Pure Food & Drugs, § 3, we find: "At this day and age it seems scarcely necessary to state the ground upon which pure food legislation rests, nor to cite cases in support of it. The right . . . rests upon the police power of the state, which remains unimpaired by the Federal Constitution. . . . It has not only the right, but it is a duty and obligation which the sovereign power owes to the public, and as no one can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised." (§ 4) "For it is the settled doctrine of this court that as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects, and that the 14th Amendment was not designed to interfere with the exercise of that power by the states." The same author, speaking of the power

of the legislature and the courts at § 4, says: "It is not a part of their [the courts] function to conduct investigations of fact entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove the determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both the power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, . . . yet in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage," quoting from *Yick Wo v. Hopkins*, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064. In *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257 (affirming 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 7 Am. Crim. Rep. 32), it is said: "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing . . . an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government." See also: *McCrary v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Walker v. Pennsylvania*, 127 U. S. 699, 32 L. ed. 261, 8 Sup. Ct. Rep. 1204; *State v. Schlenker*, 112 Iowa, 645, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 699; *St. Louis v. Schuler*, 190 Mo. 524, 1 L.R.A. (N.S.) 928, 89 S. W. 621; *State v. Layton*, 160 Mo. 474, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; *State v. Sherod*, 80 Minn. 446, 50 L.R.A. 660, 81 Am. St. Rep. 268, 83 N. W. 417; *Com. v. Evans*, 132 Mass. 11; *State v. Smith*, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410. From *State v. Smith*, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545, we quote: "When a subject is within that [the police] power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the legislature." *State v. Mrozinski*, 59 Minn. 465, 27 L.R.A. 76, 61 N. W. 560; *Helena v. Dwyer*, 64 Ark. 424, 39 L.R.A.

266, 62 Am. St. Rep. 206, 42 S. W. 1071; *State, Borden's Condensed Milk Co., Prosecutor, v. Board of Health*, 81 N. J. L. 218, 80 Atl. 30; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *Valentine v. Englewood*, 76 N. J. L. 509, 19 L.R.A.(N.S.) 262, 71 Atl. 344, 16 Ann. Cas. 731; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 59 L. ed. 515, 30 Sup. Ct. Rep. 301; *Atlantic City v. Abbott*, 73 N. J. L. 281, 62 Atl. 999. The rights of the courts are thus set forth by the supreme court of Missouri, in *St. Louis v. Liessing*, 190 Mo. 464, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 Ann. Cas. 112. "If the article is universally conceded to be so wholesome and innocuous that the court may take judicial notice of it, the legislature under the Constitution has no right to absolutely prohibit it; but if there is a dispute as to the fact of its unwholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves upon the fundamental principles of our Constitution that the act of the legislature or municipal assembly is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." See also *State v. Layton*, 160 Mo. 478, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; also *Adams v. Milwaukee*, 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518. Thornton on Pure Food & Drugs, p. 18: "If there be a doubt upon the question, then the court cannot substitute its opinion for that of the legislature. In such an instance the opinion of the legislature must be considered as right and binding." See also *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991; *State, Borden's Condensed Milk Co., Prosecutor, v. Board of Health*, 81 N. J. L. 218, 80 Atl. 30.

Keeping in mind, then, the extraordinary burdens of proof placed upon the defendant in this case in its attack upon this statute, we approach the facts in this case. As early as 1899 the legislature of this state provided for a food commissioner, and enacted pure food laws. Every session of the legislature since that time has contributed further legislation upon the subject. For nearly fifteen years complaining

witness Ladd has been such pure food commissioner, and the Agricultural College of this state has maintained a department for the testing of foods and weights, and often has had men traveling over the state, making purchases, and studying the subject of pure foods and honest weights and measures in a scientific and painstaking manner. It is not unreasonable to assume that the 1911 law was drafted by such department, after twelve years of observation and study. The expert who drafted the law, the legislature who passed it, and the governor who approved it, all thought necessity existed for such a measure. If we did not agree with all of those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law reasonable, and this belief is founded upon the evidence in this case. We will now discuss in order the subdivisions of appellant's first objection to the law.

(a) Appellant contends that chapter 195, Sess. Laws 1907, was amply sufficient to protect the commerce of the state against fraud, and that there was no necessity for the 1911 legislation, and the same is therefore void. We cannot agree with this proposition. The 1907 law was a re-enactment of the 1905 law, with a few amendments, and its text will be found earlier in this opinion. It provided that the net weight should be placed upon each package of food. The legislature was not confined to this remedy. They might repeal it and provide further regulations if they so chose. They had as much right under the police power to require even weights as they had to require the net weight to be printed upon the outside of the pail. This court has no right to interfere with legislation and say that one measure is superior to the other. During the last dozen years there has been a decided tendency of manufacturers to pack foods in cans and packages. Improved machinery and improved sanitary conditions have enabled foods to be packed cheaply and safely, therefore conditions have been changing year by year and legislation necessarily must change to meet them. The object of all net weight and measure laws is to prevent the *opportunity for fraud*. See Freund, Pol. Powers, § 274; Tiedeman, Pol. Power, § 89; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206. It is not material whether the defendant in this case was guilty of fraud in the sale of this particular

pail of lard, but was the manner of the preparation of the pail such that the people generally might be defrauded? The consumers do not have to depend upon the honesty of the manufacturer in every case. They are entitled to laws allowing them to ascertain the facts themselves. The honest manufacturers, as well as the consumers, are entitled to protection from competition with dishonest weights. There was therefore a necessity for some sort of legislation upon this subject in this state. Taking up in particular the lard industry, we find from the evidence in this case that the packers as a whole supply but 40 per cent of the lard used in this state, while 60 per cent is supplied by local butchers and the consumers themselves. Defendant has one of the largest of the packing houses, but does not of course supply more than its fair share of the trade, dividing with such houses as Swift & Company, Cudahy & Company, and Morris & Company, at least. It is apparent, therefore, that they represent something less than 10 per cent of the lard industry, and if they have obeyed the law of 1907 (which we do not concede) it would not be proof that the other 90 per cent of the industry had likewise obeyed the law. Besides, the defendant sells only to the middlemen, and there is no proof that the middlemen who purchased from defendant were obeying the 1907 law. It is thus apparent that the behavior of the defendant has but a remote bearing upon the necessity for the 1911 regulation. Nor would the fact that the defendant was obeying the 1907 law at the time of the arrest be any proof that it was obeying it at the time of the passage of the 1911 law. In other words, the law was enacted for the protection of the consumer, and the conduct of defendant in one sale is only slightly material on the general condition. Approaching still closer to the case in hand, we inquire whether or not the defendant was obeying the 1907 law. We discuss this with reluctance, because the defendant is undoubtedly following the trend of the trade of the general packers, and it is not in justice to be singled out from the others. Unquestionably, defendant makes a fine grade of lard, and much may be said in its favor from a trade standpoint. However, it has forced this argument upon us and we would be remiss in our duty did we not answer it with candor. When Professor Ladd purchased the pail of lard in evidence; it bore upon its side a lithographed label in five colors, bearing the advertisement of the lard. The words "Armour's Pure Lard" are

printed upon this label in letters over a quarter of an inch in height and covering six and three quarters of an inch in length, while the name "Shield" covers four running inches, and the small letters stand three eighths of an inch in height and the capitals larger, but upon this label there is no net weight, as required by the 1907 law (which see), but upon the left and rear of the pail completely out of sight as it would stand upon a shelf, we find a paper tag about the size of a silver half dollar, and placed thereon in aniline ink, evidently with a rubber stamp, the words, "net weight 2 lbs., 6 oz.," in letters about one eighth of an inch in height and covering three quarters of an inch in length. The wording upon the paper label is scarcely 10 per cent in size of that used in giving the name of the kind of lard. It is hard to avoid the conclusion that the defendant company prepared those tags to give the least notice possible to the consumer and yet make a showing of complying with the 1907 law. In the face of this showing alone, the legislature was amply justified in passing the 1911 act. If it be claimed that this paper tag was a temporary affair to be used until pails could be manufactured showing the net weight upon the principal label in a permanent form, we have merely to turn to the evidence of Mr. Howe, general manager of the Chicago House, where he testifies that those tags had been in use for about six years at the time of the trial, and that they were in use ever since the first pure food laws were enacted. It evidently was not the intention of this defendant to use any other designation upon their pails, or they would have done so, as they were making thousands of pails every day.

With this conduct of the packers well known to the food commissioner and legislature of this state, it was only natural that an effort be made to secure better laws upon the subject. People had been educated to call those 1, 3, 5, and 10 pound pails, as appears from the testimony of the defendant. Indeed, exhibit B in this case is a bill from Armour & Company to the Aneta Mercantile Company of Aneta, North Dakota, in which those pails were so designated by the defendant company itself. The purchaser was not able readily to extract the lard from the pail and weigh it. The lard was used from the pail itself in small portions, and the fact that the pail was included in the gross weight might not ordinarily occur to the housewife. The contention of the

defendant that it had complied with the 1907 law, and that said law was sufficient to protect the consumers, is unsupported by the evidence.

(b) Defendant further claims the law to be unreasonable, because it had been its custom and the custom of the other packers for over twenty years to use gross-weight pails, and that it had therefore become a settled right of the trade. We do not believe this argument sound. The pails have been in use less than thirty years, while the lard industry has existed for many hundreds of years. Questions like this are not settled in a day, nor in thirty years. No reason is given why gross-weight pails were used in the beginning. Gross weight is unfair, always has been unfair, and always will be unfair. Net weight is fair and just, and should eventually predominate. It is hard to believe that the selection of gross-weight pails thirty years ago was not an attempt to deceive somebody. Can it be possible that a thirty years' tolerance of an evil forever thereafter forecloses mankind from seeking a remedy? It may be that North Dakota now stands alone in this particular law; twelve years ago it stood alone, or almost alone, upon the entire subject of pure-food regulations. To-day there is scarcely a state in the Union that has not such legislation. Public opinion has forced this legislation, and it will force the net-weight legislation. Net-weight pails may be the rule, and not the exception in a very few years. While it is just that the consumer pay for the container, it is equally just that he should know how much container he was purchasing and how much lard.

(c) Defendant next contends that the law is unreasonable because it imposes an additional expense upon the packers in that they must furnish a different sized paid for North Dakota than is supplied to the rest of the states. Much evidence was introduced upon this point, but it does not appeal to us for two reasons: (1) There is no reason for furnishing other states with gross-weight pails, and (2) the evidence in this case shows that the defendant could comply with the North Dakota law with little extra expense. Mr. Nichols, superintendent of the defendant's tin shops, was one of the witnesses, and upon cross-examination admitted that the firm of Park & Tilford, of New York city, had insisted upon receiving net-weight pails, and was being supplied with the same by Armour & Company during all the time of this litigation. He says: "Q. And you make net-weight pails for them now? A. Yes, sir. We make and fill them. . . . Q. For how long?

A. I don't know, I am sure. A few years." It further appears that those pails were made in the shops of the defendant, and that they had full machinery for making the net-weight pails and could have made a few more for the North Dakota trade. To be true, the pails made for Park & Tilford are of a slightly different shape than those used under the Armour name, and contain Park & Tilford's name upon the label. But we see no reason why the Armour label could not have been placed upon some of those pails for use in North Dakota. A supply of empty pails could be kept at each packing establishment and filled for the North Dakota trade as the orders were received. At any event it would be no more expensive to furnish the sovereign state of North Dakota with those pails than it was to supply a private firm. There is no argument advanced showing extra expense in one case that would not occur in the other. That mail-order houses may supply North Dakota patrons with gross-weight pails is immaterial. The mail-order houses are protected under the provisions of the interstate commerce clause. Our law only applies to sales made within the state of North Dakota.

(d) It is next urged that the law is unreasonable because in any event the consumers are not prejudiced. That they are paying merely the price of tierce lard plus the extra expense of the tin pails, the handling of the lard in such small quantities, and packing the same. We think this argument fails, and again for two reasons. (1) The defendant does not sell to the consumer, but to middlemen. Conceding that defendant charges the middlemen merely for the actual cost of pails, we know that the middlemen would expect to profit upon his entire investment, and therefore the consumer would have to pay not the net cost of the container, but the middlemen's profit thereon as well. In exhibit B defendant sold to the Aneta Mercantile Company 1 case of 3-pound pails. The case contained 20 pails, and the Mercantile Company was charged for 60 pounds of lard at $16\frac{1}{2}$ cents a pound, or \$10.13. When the Mercantile Company placed these pails upon the counter for sale they naturally added a profit upon the whole amount invested. They had purchased $47\frac{1}{2}$ pounds of lard and $12\frac{1}{2}$ pounds of tin and had paid $16\frac{1}{2}$ cents a pound for the whole. When they sold the same the purchaser would be obliged to pay for the lard, with the profit thereon, to the Mercantile Company, and for the pail with the same profit to the Mercantile Company; and, while Armour

& Company might have made nothing upon the pail, yet the customer paid a profit. (2) An analysis of the evidence shows that the defendant company gets something besides the net cost of his pail. The plain pail costs little, but the defendant, seeing an opportunity of a lasting advertisement, has taken advantage of the consumer to advertise his goods at the housewife's expense. Mr. Nichols, explaining the manner of the preparation of the pails, says: "They are electro-type plates made of compound, compound filled with electrotype material. . . . There are four operations before it is discharged from the machine. First, the machine changes the tin, puts on one color; revolves, puts on another color, and so on till it gets five colors on, then it discharges it. . . . We have a lithographing press to do the lithographing and lacquering of the bodies, and we have a coating machine. Now, each of those machines has an oven. After it is lithographed and the lacquer, that is, the front of the lard can, there—the label is put on and lacquer around the label, it has to go into an oven with 318 degrees to 330 degrees heat, stay in four or five hours according to the atmosphere, sometimes six." The manager of the company testifies that the company gets the benefit of the lasting advertisement free. Analysis of the testimony therefore shows that Armour & Company is charging an expense of the advertising of their general business up to the lard industry. When a 20-pound pail of lard is sold it contains 18 pounds of lard and 2 pounds of pail. If the consumer pays 25 cents a pound he has paid 50 cents for the pail and \$4.50 for the lard. This pail has cost the defendant around 4 cents for tin and a few cents for the making of the pail, which is done by machinery and very cheaply, and the rest of the charge must be for incidental expenses, including the lithographing, and nobody knows the items thereof. The consumer is entitled to this information, and the 1911 law helps to supply it. The policy of all such laws is to make it easy for the purchaser to calculate the price that he is paying for the lard, and to detect fraud. As we have said before, it is not a question so much of the intention of one particular packer, but a question of opportunity for fraud. It is hard to conceive of any system offering more opportunities for fraud than the gross-weight system. If some dishonest packer should decide that the present pail was too light to stand the strain of commerce, and should double the weight of his pail, the housewife would pay lard prices for tin,

and honest packers would find themselves competing with the rascal who was making a 25 per cent profit to which he was not entitled.

(e) It is next urged that the law is unreasonable in that other traders have been using gross-weight methods also. For instance, they claim that butchers weigh the paper along with the meat, and charge meat prices for the paper. To this we have only to say that if the statement is true, the butcher is dishonest in charging 25 cents a pound for paper that cost him less than a cent a pound. However, this would not help the defendant. The fact that the butcher may be dishonest in his business does not excuse dishonest methods in other lines, nor render unreasonable laws to regulate them.

(f) The defendant urges that the enforcement of this law will drive the packers to use bulk lard only, and that this is unsanitary. This is not in point. The packers have never supplied more than 40 per cent of the trade of this state. During the past two years the packers have withdrawn from this state with their pails, and there is no sign of any great damage to the state. We do not believe the packers will abandon North Dakota nor that it would ruin the state if they did.

Thus, upon complete analysis we find that the 1911 law is not unreasonable, arbitrary, or capricious: that it has supplied a necessary piece of legislation and that it has worked no hardship upon the defendant in this case.

We think that we have given reasons enough to sustain our position without reference to the decisions of other states, but upon an examination of all the authorities upon statutes in any way similar we find our position sustained by a large majority of the decisions. True, no state has a law *exactly like* our net-weight lard law, but other states have regulated similar articles, bread, corn meal, tobacco, molasses, etc., generally. We review a few of those cases. The state of Tennessee enacted a law requiring corn meal to be put up in sacks containing 2 bushels, 1 bushel, $\frac{1}{2}$ bushel, $\frac{1}{4}$ bushel, or $\frac{1}{8}$ bushel respectively, and made it unlawful to pack for sale, or sell, or offer for sale any corn meal in bags of other weights. This is almost identical in principle with the case at bar. This is a well-considered case collecting almost all of the authorities. Therefrom we quote: "Legislation for the prevention of fraud in weights and measures, especially in the sale of food and other essentials of life, was early enacted in England and is common in all the state.

. . . It simply provides that when a certain staple article of food, of universal consumption in this country, is sold in packages, the packages shall contain certain quantities of the article, and that the quality and quantity . . . shall be printed and marked thereon. It is well known that corn meal is generally sold by the bushel, or the fraction of a bushel, and is put in packages purporting to contain such quantities, and the object of the statute is to prevent the giving of short weights in these packages, and the consumers from thus being deceived and defrauded, it is true of small sums, but which on account of the numerous sales, in the opinion of the legislative department, is a public evil which should be suppressed. It in no sense deprives the owner of his property, or the power to sell and dispose of it in a fair and honest manner. Nor is the act when properly construed discriminatory. It does not prohibit the manufacturer, the wholesaler, or any person from selling meal in any bag or other receptacle, or quantity, desired by the seller or consumer when priced and delivered by actual weight or measure. All persons, whether retailers or not, may sell it in that way. The statute only applied where it is put in bags or packages for sale, and sold or offered for sale without being weighed or measured." For the benefit of persons who have not access to this (Tennessee) case we repeat the authority. *State v. Co-operative Store Co.* 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248; *People v. Luhrs*, 195 N. Y. 377, 25 L.R.A. (N.S.) 473, 89 N. E. 171; *People v. Girard*, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; *John P. Squire & Co v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 323, 69 N. E. 312; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *Freund, Pol. Power*, § 275. We also believe the bread cases, as they are called, are an authority upon this proposition. We will not lengthen this opinion by extracts from those cases, but it is sufficient to say that there is not much difference in principle between regulating the weight of a loaf of bread and the con-

tents of a pail of lard. Below is a list of those cases: *Com. v. McArthur*, 152 Mass. 522, 25 N. E. 836; *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441; *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; *Chicago v. Schmidinger*, 243 Ill. 468, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182; *State v. McCool*, 83 Kan. 428, 111 Pac. 477; *State v. Belle Springs Creamery Co.* 83 Kan. 389, — L.R.A.(N.S.) —, 111 Pac. 474. Also in point, as we think, are the coal cases and particularly *McLean v. State*, 81 Ark. 304, 126 Am. St. Rep. 1037, 98 S. W. 729, 11 Ann. Cas. 72, in which the supreme court of Arkansas sustained a law having many features similar to our statute. Upon appeal to the Supreme Court of the United States this case was in all things affirmed. See 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206. We find an excellent discourse upon this subject by the highest court of this land, from which we give a short quotation, as it is a very recent case and practically overrules *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, which is practically the only case relied upon by the appellants: "Liberty of contract which is protected against hostile state legislation is not universal, but is subject to legislative restrictions in the exercise of the police power of the state. . . . The legislature of the state is primarily the judge of the necessity of exercising the police power, and courts will only interfere in case the act exceeds legislative authority; the fact that the court doubts its wisdom or propriety affords no ground for declaring a state law unconstitutional or invalid." Also more or less in point, we think, are the shingle cases, oleomargarine cases, tobacco cases, and others too numerous to mention, but which may be found in a note to the Tennessee cases, where the same is reported in Ann. Cas. 1912C, at page 251, and running to page 259. The text writer gives a list of the statutes which, as he said, "intended to prevent fraud by prohibiting arbitrary deductions by buyers from the gross weight of particular commodities, has been held to be within the police power of the state, and not to interfere unlawfully with the freedom of contract." Further authorities might be given, but space forbids.

(2) Taking up the second objection, the defendant claims the law unconstitutional because it interferes with the guaranties of the right of freedom of contract and of the equal protection of the law afforded

by the Constitution. This contention has been made so often and been so often overruled, that we will give it but the merest mention. We quote from *Deems v. Baltimore*, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648, as follows: "To justify such interference with private rights, its exercise must have for its immediate object the promotion of the public good, and so far as may be practicable, every effort should be made to adjust the conflicting rights of the public and the private rights of individuals, at the same time the emergency may be so great and the danger to be averted so eminent, that private rights must yield to the paramount safety of the public. And to await in such cases the delay necessarily incident to ordinary judicial inquiry in the determination of private rights would defeat altogether the object and purposes for which the exercise of this salutary power was invoked. Whatever injury or inconvenience one may suffer in such cases, he is, in the eye of the law, compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public." See also *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 7 Am. Crim. Rep. 32, *supra*. It thus follows that where the law is a reasonable exercise of the police power, that it does not interfere with the guaranties of the right of freedom of contract.

(3) The third contention of the appellant is that the statute constitutes the taking of property without due process of law. Much the same answer can be made to this that has been made in article 2. In the case at bar no property has been taken without due process of law.

(4) The fourth claim of appellant is that the 1911 statute is void as class legislation; that lard is singled out from all the articles of food and subjected to restrictions while being prepared for market. To this it need only be said that the law of 1911 as well as many preceding laws regulated the manner of selling *every article of food* and beverage. Lard, lard compounds, and lard substitutes being sold largely in pails, required a particular regulation not necessary for the regulation of such articles as butter, eggs, milk, and cream. The regulation of the size of the pail is but an incident of the law. The fact that all foods are subject to regulation to prevent the opportunity for deceit is the main idea of the law. In appellant's brief the argument is made that the 1911 law is discriminatory in that it prescribes no regulations for such

articles as crisco, cottolene, vegetole, it being the contention of defendant that those articles which contain no animal fat are not "substitutes of lard." The witness Fox was placed upon the stand evidently to testify as an expert to this effect, but upon cross-examination he admitted that those vegetable compounds are intended to and do take the place of lard and serve as a substitute for lard. The statute in express terms covers lard, lard compounds, and lard substitutes, and in our opinion applies as well to crisco and the other vegetable compounds as to lard itself, as those articles are used instead of and as a substitute for lard. There is therefore no discrimination against the lard industry. To the effect that those compounds are lard substitutes, see: *State v. Hanson*, 84 Minn. 42, 54 L.R.A. 468, 86 N. W. 768; *State v. Aslesen*, 50 Minn. 5, 36 Am. St. Rep. 620, 52 N. W. 220; *State v. Snow*, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777. Upon the question of class legislation, also see *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, *supra*, from which we quote: "The statute places under the same restrictions and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibition; thus recognizing and preserving the principle of equality among those engaged in the same business."

(5) The fifth claim of the defendant is that the law is in violation of the commerce clause of the Federal Constitution. In this we believe that appellant is again mistaken. The power of Congress and the power of the state are two distinct and separate things. Thornton, in his excellent word on Pure Food and Drugs, says in his preface: "In the last few years great interest has been taken in the subject of pure food. . . . The Federal pure food and drugs act of June 30, 1906, has acted as an incentive for state legislation on the subject of foods and drugs. . . . Owing to the complex systems of government under which we live, the states were not able to protect their inhabitants as effectually as was necessary or desirable. They had no power over food that entered into interstate commerce, until it was too late adequately to protect the consumer. The Federal pure food and drug act of June 30, 1906, is intended to cover the point which the states were not able to reach, and it has been far more efficacious in its provisions than perhaps the law of any state has been for its own citizens. But the Federal statute does not by any means reach all instances of adulterated foods

and drugs. By far the greatest quantity of food never passes beyond, and it is never intended that it shall pass beyond, the boundaries of the state. *Congress cannot regulate the sale of this food. It remains for the state to do so.* There have been many statutes enacted by the states to cover this subject, especially since the adoption of the Federal statute of 1906. There is no state in the Union but what has enacted statutes on the subject of pure food and drugs, and quite a number of them are modeled—at least in part—after this one of 1906.”

Whether or not the sale in this instance was an interstate or an intrastate sale becomes important in determining whether the prosecution should be under the Federal or the state laws, and for this purpose we refer to the testimony in this case. Mr. Howe, general manager of the Omaha plant, testified that they had a branch office in Fargo, North Dakota, to which point carload lots were shipped, to be later broken up and distributed to the smaller towns of the state. Sales were not made to their customers in carload lots, owing to the small size of the local sales. Some of the state of North Dakota was covered from Aberdeen, South Dakota, in a like manner. Professor Ladd testifies that on the 8th day of September, 1911, in the city of Fargo, North Dakota, he went to the person in charge of the Armour & Company establishment at Fargo, and called for 3 pounds of Armour's Shield Lard. This was given to him, and he paid therefor, and took the same away. At that time the pail was one of a crate of 20 pails which had been crated for convenience in shipping. The manager of the defendant company broke open this crate, and took therefrom the single 3-pound pail of lard, and then and there sold it to Professor Ladd. Under these undisputed facts we are asked to say that the single pail of lard was an interstate shipment, and as such coming under the inhibitions of the Federal pure food law of 1906, and thereby not a violation of the state law. We find the law upon this point pretty well settled in the courts of the various states and of the United States under the heading of original packages. The cases under this subject are collected in Thornton on Pure Food & Drugs, § 88, and we will but briefly refer to some of the leading cases mentioned by him. Thus, in *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 244, 21 Sup. Ct. Rep. 132, affirming 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305, it is said: “Original packages are such as are used in bona fide transactions carried on between

the manufacturer and wholesale dealers residing in different states," and in *Guckenheimer v. Sellers*, 81 Fed. 997, it is stated: "An original package within the meaning of the law of interstate commerce is a package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped." In *Re Harmon*, 43 Fed. 372, it was held that where several bottles of whisky were wrapped in paper, and sealed and packed in an uncovered wooden box, and shipped from one state to another, that the wooden box was the original package and that the bottles were not. In one instance a merchant from Tennessee purchased from a factory in North Carolina a number of cigarettes in boxes, which were shipped to him in small packages containing ten cigarettes each. Those packages were piled together upon the floor of the factory in North Carolina, and the express company notified to come for them. An employee of the company took a large basket belonging to the company, and gathered therein the small individual boxes, put them upon the train, and shipped them into Tennessee. In the latter state there was a law prohibiting the sale of cigarettes. When the packages reached Tennessee, the agent of the express company took the basket to the store of the defendant, emptied the packages upon the counter, and took away with him the basket. The store keeper sold some of the cigarettes, and was arrested and convicted; he appealed to the supreme court of that state, claiming that each small package of cigarettes was an original package and an interstate transaction, making practically the same claim that is made in the case at bar. His conviction being affirmed in the Tennessee court, he then sued out a writ of error to the Supreme Court of the United States, where the conviction was again affirmed, and the Supreme Court of the United States said: "Original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealers residing in different states. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the state to which it is sent, it will not be protected as an original package against the police laws of that state." *Austin v. Tennessee*, supra, also *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233, 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372, where some boxes of cigarettes were shoveled into a car in Missouri and delivered in Iowa in that condition, and where a conviction was sustained

not only in the state courts, but upon appeal to the United States Court. See also *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, affirming 156 Mass. 236, 15 L.R.A. 839, 30 N. E. 1127; and *Crossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234, affirming 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097, which latter cases were decisions upon the law as it existed prior to the enactment of the 1906 United States Law. Thornton says: "From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the food and drugs act is a unit complete in itself delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. This unit may be hogshead containing 500 bottles of wine, or a single can of tomatoes, or it is a small ounce phial of some drug if shipped to the consignee in that form; and if the consignee sells or gives away any one of the three in the unaltered condition in which he received it, if the contents be adulterated or misbranded, he has violated the act." [§88] Thornton referring, of course, to the United States act. It follows as a natural conclusion that if he broke the packages and sold one of them, and it was misbranded, it would be a violation of the state act.

The breaking of the original package once, if not twice (car and case), before the sale was made, added the goods to the general property of the state of North Dakota, and the subsequent sale was an intrastate transaction and subject alone to the laws of the state of North Dakota. It naturally follows that the defendant is not protected under the commerce clause of the United States Constitution.

(6) We reach now the sixth heading, that in no event under a proper construction of the statute can a conviction be sustained. At the oral argument of this case counsel stated that they had no intention of raising any minor objection to the information, nor did they desire a decision which would evade the question of the constitutionality of the law in question, and that under this objection they meant to be considered the following proposition: that the courts should give a reasonable construction to the law, and in this instance hold that, notwithstanding the wording of the law, that it should be so construed as to permit the

sale of any sized pail providing that the net weight were stated thereon. In answer to this we have to say that the wording of the statute is too plain to admit of any such construction. The object of the law was to prevent the opportunity for fraud presented when the pail did not contain an even number of pounds, net weight. Any other construction would effectually wipe out the statute itself. This construction cannot be supported by reason or authority, and it will not be adopted by this court.

(7) At the time of the oral argument the objection was made to the statute that the pure food and drug act of June 30, 1906, was an assumption of the entire field by Congress, and that therefore the laws of North Dakota upon that subject were in effect repealed or rendered inoperative. Under § 5 we have outlined fully the field of congressional control and the field of state control. Congress can only regulate interstate commerce. The states have exclusive control of intrastate commerce, and, in the absence of legislation of Congress, have certain rights of control over interstate commerce within the boundaries of the state, while Congress is limited to control of "commerce with foreign nations, among the several state, and with the Indian tribes." The assumption by Congress of its authority to regulate the interstate commerce effects nothing excepting the right of the state to control interstate commerce within its borders, and does not in any manner curtail the right of the state to control its own commerce, provided such state control does not incidentally interfere with interstate commerce. It is thus seen that none of the objections raised by the defendant to the validity of chapter 236, S. L. 1911, has any merit, and as no other points have been presented to us, we must hold that the law is constitutional, and the conviction thereunder is accordingly affirmed.

BRUCE, J. (specially concurring.) I concur in the opinion of Mr. Justice Burke. The relative spheres of the courts and of the legislatures in the matter of the so called police power control seem now to have been well defined by the courts of the county, and especially by the Supreme Court of the United States. In *Planters' Bank v. Sharp* (1848) 6 How. 301, 319, 12 L. ed. 447, 455, we find the following: "It is to be recollected that our legislatures stand in a position demanding often the most favorable construction for their motives in

passing laws, and they require a fair rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reforms in abuses, the disposition in the judiciary should be strong to uphold them."

In the Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501, Mr. Justice Waite, in speaking for the court, said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In the case of *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 563, 55 L. ed. 337, 31 Sup. Ct. Rep. 259, the court, among other things, said: "There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. . . . Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether *it is the best means to achieve the desired result*, whether, in short, the legislative discretion within its prescribed limits should be exercised *in a particular manner*, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. . . . 'The

legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that *judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference*, unless the act in question is unmistakably and palpably in excess of legislative power.

. . . If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.' ” See also *People v. Smith*, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; *Wenham v. State*, 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *People v. Bellet*, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; *State v. Olson*, 26 N. D. 304, — L.R.A.(N.S.) —, 144 N. W. 661, 13 Columbia L. Rev. 667. The trend of authority in the United States, indeed, is undoubtedly in support of the proposition that the main question for the courts to determine is whether the subject-matter is one over which the legislature can exercise a supervisory control, and that the questions of method and of exigency are questions which must generally be left for the legislative bodies to decide. If a regulation is within the scope of the legislative power and its purpose is not arbitrary supervision, but the protection of the public, the mere fact that it may be unwise in the opinion of the courts or involve an added expense upon the consuming public is no justification for judicial interference. The main arguments against the provisions of the statute which are now under consideration are that their enforcement might possibly prevent the sale of lard in packages in the state of North Dakota, or might so increase the cost of manufacture that an added price would have to be paid by the consumer. These matters, however, are for legislative, and not judicial, determination. The legislature is drawn fresh from the people. It has the power to appoint committees to examine and to investigate. It and the governor, who has the power

to veto and to prevent the passage of unpopular and unsocial legislation, have determined that the rest of this added expense shall be run, and have determined that the prevention of fraud and of short weights is at the present time the paramount necessity. It is too late to contend that the legislature in the proper case has not the power to provide for the size of packages when that size may have a tendency to prevent a deception in weight. (See cases on size and weight of packages and of bread, etc., cited in the principal opinion.)

The reasoning of counsel for respondent may not appear conclusive to this court, but we cannot say that the legislature was not justified in considering it to be so. "Lard," says counsel for the state, "is a household necessity which is largely used in cooking and baking, and, for convenience in handling, as well as for other reasons, it has become a universal and extensive practice to pack lard for sale in pails or containers of convenient size for meeting the requirements of the ordinary householder buying lard. These pails have acquired by usage the designation of 3-pound pails, 5-pound pails, and 10-pound pails. The actual net weight of lard they contain depends upon the whim of the manufacturer. The actual amount of lard in these several pails put up by the defendant is as follows: In 3-pound pail 2 pounds, 6 ounces of lard; in the 5-pound pail 4 pounds, 2 ounces of lard; in the 10-pound pail 8 pounds, 10 ounces of lard. In the mind of the average buyer, however, the pail contains the number of pounds of lard which its name implies; that is, the 3-pound pail represents 3 pounds, the 5-pound paid represents 5 pounds, etc. In the absence of any law requiring the net weight of the commodity to be disclosed, the manufacturer or merchant has the opportunity to actually and even wilfully deceive as to the actual contents of the package. He may reduce the net weight of the lard, or increase the weight of the package; and unless the container is opened and the contents actually weighed, the consumer must depend upon the representations of the maker or merchant as to the real amount of lard he is getting. In actual practice the representations of the maker or merchant are accepted and acted upon by the general run of consumers. Nay more—the popular conception as to the quantity of lard is the conception accepted and acted upon by the ordinary buyer; and the maker and merchant can merely tacitly adopt the popular conception, and profit accordingly at the expense of the

buying public. In short, they can take advantage of the popular conception as to the quantity of lard, and thereby collect without the buyers' actual knowledge the same price for the weight of the package as they get for the contents. As a result of this practice the buying public not only may but actually have been paying large sums for tin and packing which they would not have paid had their attention been specifically directed to what they were doing. . . . Labels disclosing the net weight are not effective in actual practice, because the popular designation of a package will continue to prevail in spite of labels. Then, too, labels are oftentimes and in fact generally are unheeded. The ignorant heed them not because they do not understand them. The busy housewife as a rule does not notice them. Then, also, labels are easily removed or displaced either by intention or design. . . . The only safeguard to insure the effectiveness of such a law is to standardize the package; that is, to make the net contents correspond with the popular designation of the package. . . . The reason for not permitting fractions of a pound is obvious. If fractions of a pound were permitted, the difference between the size and appearance of two pails of different weights would not be readily discoverable, and hence deception and misrepresentation would be greatly facilitated. For example: It would be difficult without careful examination to see the difference between 2½-pound pail and a 3-pound pail." These reasons may not appear conclusive to the court, but we cannot say that the legislature was without reason in considering them.

Nor, too, is there any force in the contention that the statute in question is in derogation of the interstate powers of the Federal Congress. The most recent cases upon the subject, and upon which counsel for the defendants principally rely (*Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; and *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431) make it clearly appear that the mere fact that Congress may have passed a so-called food and drugs act has not tied the hands of the state in the case in question. State statutes in such cases are only invalidated where they interfere with or frustrate the operation of the acts of Congress. It cannot be said that the act in question does this. It is merely supplementary thereto. All that the act of Congress says is that if the weight of the package is given upon the label it shall be the

correct weight. The cases of *Savage v. Jones*, and *McDermott v. Wisconsin*, in fact, are authorities for, and not against, the state in this case. It is true that in the latter case, the statute of Wisconsin was held invalid; but the statute of Wisconsin forbade the use of the Federal label altogether. Federal regulations of interstate commerce have perhaps been widely extended, but we do not believe that the courts have yet construed the power so as to take from the states the inherent right of self-protection; nor can we believe that it was ever intended by the framers of our government that the protection of the people of a state from fraud and adulteration should be dependent upon the whim of a Federal Congress, located thousands of miles away, with no knowledge of local conditions, and located in what the late Justice David J. Brewer has termed the "lobby camp of the world." It also appears to me that in the case at bar the question of interstate commerce is not really involved, as the original package seems to have been broken.

FISK, J. (dissenting). I cannot concur in the conclusions reached by the majority. Much that is said in the majority opinion concerning abstract propositions of law is concededly correct and no longer open to debate in the courts. Indeed, counsel in the case at bar do not disagree in the least upon those fundamental and well-settled rules; nor do they seriously differ in any respect other than in the application of such rules to the case in hand. I take it for granted that all must agree that, in its exercise of the so-called police power of the state, the legislature does not have absolutely a free hand, but is restricted by certain constitutional limitations, and that it is the solemn duty of the courts, when called upon so to do, to uphold such constitutional limitations by pronouncing any act null and void which plainly transgresses them. Instead of the legislature being the exclusive judges, it is for the courts to determine whether an attempted exercise of such police power is necessary for the public welfare, or whether it is a mere arbitrarily, unnecessary, and capricious interference with the legitimate business of the citizen.

I am, therefore, unwilling to sanction the doctrine that because Professor Ladd, who concededly stands high in the public estimation as an expert on pure foods and pure drugs, drafted the bill which finally became the act in question, and that such legislation successfully found

its way upon our statute books through the friendly offices of both the legislative and executive departments of the state, that this gives it a *carte blanche* which the courts are in duty bound to respect. If such a doctrine is to receive the sanction of the courts, I fear that serious consequences may result, even through the best of intentions on the part of such distinguished experts as Professor Ladd, although in good faith sanctioned by legislative and executive authority. That such doctrine is not the law, I think the courts have spoken in no uncertain language. A mere statement of the proposition ought to suffice to disclose its fallacy. In support of my position I deem it entirely useless to do more than refer to a few expressions of the courts and law writers upon the question.

The supreme court of Illinois has said: "When the police power is asserted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and to exercise his own judgment as to the manner of conducting it." *Rubstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453, and cases cited.

The United States Supreme Court in *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, in speaking upon this subject through Mr. Justice Brown, said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from those of a particular class require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

As is very aptly stated by Freund on Police Power, § 494: "To prevent an abuse of the police power for the alleged protection of health or safety, or the alleged prevention of fraud, the courts must be allowed to judge whether restrictive measures have really these ends in view. A

remote and slight danger should not be recognized as a sufficient ground of restriction, and the provisions of the law should be scrutinized in order to see whether they in reality tend to effectuate their object."

Upon the question of the police power of a state and the restrictions upon its exercise, Marshall, J., in speaking for the supreme court of Wisconsin in a recent case, very exhaustively and accurately stated what I deem to be sound. Among other things, he said:

"It is conceded that the legislation in question was an attempt to exercise the police power of the state, which is inherent in sovereign authority under such limitations as exist in the national and state Constitutions, and that if as a police regulation it is not legitimate, it is not the law though possessing the form thereof. A legislative enactment approved by the executive, and duly published, is not necessarily a law or binding on anyone in respect to his liberty, his business, or his property. It is such if it is susceptible of passing the judicial test of whether it is warranted by the fundamental law, which our constitutional system contemplates may be applied to all such enactments. Perhaps the thought sometimes expressed that the vital feature suggested, which every good law must possess, is not as fully appreciated by the lawmaking power as it ought to be, leading to infractions of some express limitation as well as that broad general restriction of legislative power contained in the declaration that 'all men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.'

Too much dignity cannot well be given to that declaration. That it was intended to cover a broad field not practicable to circumscribe by any specific limitation or limitations cannot well be doubted. This court has given thereto its proper place in unmistakable language, particularly in recent decisions. *Durkee v. Janesville*, 28 Wis. 464, 471, 9 Am. Rep. 500; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 435, 56 L.R.A. 252, 87 N. W. 561; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *State ex rel. Jones v. Froehlich*, 115 Wis. 32, 42, 58 L.R.A. 757, 95 Am. St. Rep. 894, 91 N. W. 115; *State ex rel. Mil-*

waukee Medical College v. Chittenden, 127 Wis. 468, 521, 107 N. W. 500. Doubtless the fathers of the Constitution foresaw the likelihood and danger of the security of personal rights, which the fundamental law was intended to firmly intrench with the judiciary as its efficient defender, being jeopardized at times by excessive regulation of the ordinary affairs of life, and, with that in view, incorporated in the fundamental law at § 22, article 1, that admonition so full of meaning: 'The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.'

The idea is found expressed now and then, that the police power is something not dealt with or affected by the Constitution, at least in any marked degree, which is a mistake hardly excusable. The error suggested here and there, that the police power is 'a sovereign power in the state, to be exercised by the legislature, which is outside, and in a sense above, the Constitution (Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389, or that a police regulation which is clearly a violation of express constitutional inhibition is legitimate, subject to a judicial test as to reasonableness. . . . (Tiedeman, State & Federal Control of Persons & Property, § 3), or that no police regulation, not condemned by some express constitutional prohibition, is illegitimate, or that legislation not so condemned is legitimate if the law-making power so wills, though it violates some fundamental principles of justice, or that the reasonableness of a police regulation, and whether it unjustly deprives the citizen of natural rights, is wholly of legislative concern (Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47), and others of a similar character now and then found in legal opinions and text-books, are highly misleading' and have been distinctly discarded by this court. State ex rel. Milwaukee Medical College v. Chittenden, supra. As was there said, 'If it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the legislature so wills, the Constitution as to very much of the field of civil government would be of no use whatever. The contrary has been the rule without any legitimate question since Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.'

"The following significant expressions of this court as to the consti-

tutional limitations in the exercise of the police power leave nothing further to be said on the subject:

‘As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions. . . .’ State ex rel. Adams v. Burdge, 95 Wis. 390, 398, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347, 349.” State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408.

Judge Marshall, in the above case, defines the term “police power” as “the power to make all laws which in contemplation of the Constitution promote the public welfare.” And he says “that both defines the power and states the limitations upon its exercise, it being understood that it is a judicial function to determine the proper subject to be dealt with, and that it is a legislative function, primarily, to determine the manner of dealing therewith, *but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitation, express or implied.* This court, in common with others, has said that the police power extends to legislation, regulating, reasonably—that is, to an extent not entering the realms of the destructive—all matters appertaining to the lives, limbs, health, comfort, good morals, peace, and safety of society. . . .

As it is a judicial function to define the proper subjects for the exercise of police power (Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71), it must be to decide, as to any enactment, whether it really relates to a legitimate subject, or under the guise of doing so violates rights of persons or property. The idea that all legislation is within the police power which the lawmaking authority determines to be so, and that all which might be within such power is within it if the legislature so determines, is, as we have seen, a heresy, and one which was repudiated sufficiently for all time by the early decision, heretofore referred to, in Marbury v. Madison, supra, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the legislature and the judiciary thereto and to each other. The doctrine there laid down

more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidentally, inconsiderately, or ignorantly.

These words of the Supreme Court of the United States, speaking by Mr. Justice Harlan, in *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273, 297, express in a different form the spirit of the opinion in *Marbury v. Madison*, *supra*:

‘The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.’ . . . It is not every enactment which will, to some extent, promote the public health, comfort, or convenience, which is legitimate. Otherwise the way would be open for legislative interference with the ordinary affairs of life to an extent destructive of many of the most valuable purposes of civil government. An expert on sanitation, or one on the manner of living best calculated to promote long and enjoyable life, who has become an enthusiast in his special study of the matter, could doubtless suggest a multitude of really, or apparently, good rules to be followed; the temperature of the air of sleeping rooms, the proper size of the rooms as regards the number of occupants, the arrangements for frequently changing the air by displacing that within for that without the habitation, the hours for sleeping, for retiring, and for arising, the amount and kind of food to eat, the proper number of meals per day, the proper admixture of solids and liquids, and length of time for each meal, the amount and kind of exercise required, and other things too numerous to mention might be suggested for legislative interference, each with a provision for severe penalty for its violation, with a division of the penalty, perhaps, between the informer and the public, till one would be placed in such a strait-jacket, so to speak, that liberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property,—those things commonly sup-

posed to make a nation intelligent, progressive, prosperous, and great,—would be largely impaired and in some cases destroyed. That such an extreme would be regulation run mad, and is quite improbable, 'tis true, but it would be possible without limitations of some sort, if a police law be conclusively legitimate merely because it promotes, however trifling in degree, public health, comfort, or convenience."

That police regulations must bear the judicial test of reasonableness under the circumstances is well settled. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Rideout v. Knox*, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390.

The highest court in our land in the recent case of *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, announced the principle that the individual right to make contracts in relation to business is a part of that liberty protected by the Constitution. The court there fully vindicates the right of the individual to freedom in the conduct of any legitimate business and his right to make contracts accordingly.

The New York court of appeals in the recent case of *Schnaier v. Navarre Hotel & Importation Co.* 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561, announced a principle in harmony with the foregoing. In condemning as unconstitutional a statute requiring that every employing or master plumber shall be registered and hold a certificate of competency from the examining board of plumbers of the city, the court said: "It is not within any reasonable or proper exercise of the police power, since a provision for the registration of the firm as such, or for the registration of one or more members of the firm who were skilled plumbers to act for the firm, would be a sufficient protection to the public from all the dangers that the legislation was supposed to prevent or mitigate."

According to the reasoning of the majority opinion in the case at bar, as I construe it, the question of the sufficiency of the protection afforded the public under the facts in the New York case would be held a legislative, and not a judicial, question.

With these preliminary observations and the foregoing well-entrenched rules as to the limits controlling the legislative exercise of the police power in mind, I approach a consideration of the act in question, which is chapter 236, Laws 1911.

Such act purports to regulate "weights, measures, and count of food products." Section 2 reads: "Every lot of lard or lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers holding one (1), three (3), or five (5) pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. If the container be found deficient in weight, additional lard, compound, or substitute shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight, together with the true name and address of the producer or jobber. . . ."

Appellant was informed against and convicted for selling to one E. F. Ladd "a quantity of lard, and not in bulk, which said lard was then and there put up, sold, and delivered to said E. F. Ladd in a pail which then and there held more than 2 pounds and less than 3 pounds net weight of lard, to wit, 2 pounds and 6 ounces of lard, and which said pail or container did not then and there have or display on the face label thereof the true net weight of said lard in even pounds or whole multiples thereof, but expressed the weight of the lard in pounds and ounces." The quotation is taken from the information, and it should be noted that the only complaint is that the pail did not contain even pounds, it being expressly alleged that the true net weight was stated on the face label thereof in pounds and ounces. Defendant appeals from the judgment of conviction.

The statute is assailed as unconstitutional upon various grounds, but two of which I need notice.

Appellant contends that the act complained of is unnecessary, unreasonable, arbitrary, and capricious as applied to the lard industry at the date of the passage of the act; and as a side-light to show the correctness of such contentions it offered at the trial a large mass of testimony showing the growth and development of the lard industry, the business methods in vogue in the conduct of such industry at the date the act was passed, and also showing the effect of such act upon this industry. Such testimony is uncontradicted, and while the same is not necessarily of controlling or any particular weight in determining the constitutionality of the law in question, I here give space to the following summary of such testimony as stated in appellant's brief:

"Lard is not used as a food by itself, but only in the preparation of

foods. It is a pastry shortening and cooking fat. It bears the same general relation to foods in the domestic economy as seasoning or spices, on the one hand, and butter and oils, on the other. The original shortening and cooking facts were vegetable products, notably olive oil, cocoanut oil, peanut oil, and a considerable number of other similar vegetable oils. Indeed these oils have all along been used in large quantities for these purposes. To them should be added cotton-seed oil, which is one of the most popular and commonly used shortening products at the present time. By a process of hardening and bleaching these oils have the general appearance and consistency of lard, and are put up in pails of similar size and shape.

"Aside from the production of lard in the home and retail market, the principal source of supply is the packing establishments. In these establishments lard is a by-product, utilizing the fat of the hog remaining after taking away the portions that commonly go into hams, bacon, pork loins, and pork sides. The relative proportion of lard from these various sources at present sold in North Dakota has been estimated at 40 per cent produced by local meat markets, 20 per cent by consumers, and 40 per cent by packing establishments.

"Originally lard was sold only in tierces or tubs, a method of sale commonly referred to as in 'bulk,' but early in the industry there arose a demand for smaller packages of a size suitable for the consumer, and this demand has been supplied by lard in pails. The demand for this style of package began about the year 1880, and has grown until at the present time about 40 per cent of the lard sold by the defendant in the United States is put up in pails.

"The advantages of the handling of lard in pails are numerous to the manufacturer, dealer, and consumer; namely (a) the improved keeping and handling qualities of the article, both in the store and home; (b) the protection to the public against careless or dishonest tradesmen as to the quantity given; (c) the greatly improved sanitary condition of the product; (d) the preservation of its freshness, wholesomeness, and bright appearance, which qualities are largely lost by exposure to the atmosphere; and (e) the greater convenience to the merchant in that it is already weighed and put up, and to the housewife in that it is delivered in a suitable receptacle for keeping the product, which receptacle may be afterwards used for other purposes.

"From the beginning of the industry lard in pails has always been sold in gross weight packages. Manufacturers have always filled the packages to the full gross weight. There has been no disposition to give short weights.

"From the beginning the price has always been based upon the price of the same grade of bulk lard, to which has been added only the cost of the labor and material required to make this convenient and sanitary package."

Attention is called to the fact that for a great many years all products sold by weight in package form have been sold on the basis of gross weight, and that this is well understood by dealers, as well as by the public generally, and has been recognized as a legitimate business method, and counsel for appellant argue that the effect of the law in question strikes a blow at this long-established standard or method in the business world, and arbitrarily substitutes one heretofore unknown in the industry.

The evidence discloses that the appellant maintains packing establishments at numerous large centers throughout the country, at each of which points lard is prepared by it for the market. That defendant manufactures its own pails of tin of a specified weight and size, and that in such manufacture it has installed complicated machinery at great expense, and that the pails used by it at the time this prosecution was instituted consisted of twenty different styles and sizes, requiring an equipment of special material, machinery, and appliances at each of its plants for the different styles and sizes of such pails, and it offered expert testimony to show the expense which it would be put to in complying with the act in question in order to supply its North Dakota trade. It is, of course, perfectly apparent to anyone, and it needs no testimony to show, that to comply with this law the various lard manufacturers would be put to an enormous expense, which ultimately would have to be borne by the consumers of lard in this state. Such fact, however, is not a controlling consideration, but merely a sidelight tending for what it is worth to shed light upon the reasonableness or unreasonableness of the act in question. If the legislature in the enactment of such statute did not transcend the due exercise of its police powers, and if the act in no way infringes the mandates of the Federal or state Constitutions, then it is clearly our duty to uphold the same,

however onerous its provisions may prove to be, either to the manufacturers of lard or to the consumers thereof. This, of course, goes without saying, for it is elementary.

One of the crucial questions for determination is whether the provisions of the act requiring the pails to contain "one (1), three (3), or five (5) pounds *net weight*, or some whole multiple of these numbers, and not any fractions thereof," is a reasonable, and not a purely arbitrary and capricious, requirement. Appellant does not question the power of the legislature to require the net weight of the article to be stated upon the outside of the wrapper or container, and whether appellant has complied with chapter 195, Session Laws of 1907, thus prescribing, as well as the other requirements of that law, in regard to the matters to be stated upon such wrapper, is not here in question. I do not think it can be successfully contended that the method thus universally in vogue in the lard industry at the time this law was enacted in any way tended to deceive or mislead the purchaser as to the weight and contents of the pails. It would seem clear, therefore, that there was and is no necessity or justification for that portion of the 1911 enactment here challenged. Will a package or pail of lard containing an *even* number of pounds (net weight) with a necessary gross weight somewhat larger, tend in any respect to protect the purchasers from fraud or deception to any greater degree than packages containing a net weight *in pounds and ounces*, when such net weight is plainly noted on the outside wrapper? Is it, in other words, within the proper exercise of the police power to prescribe that lard in pails cannot be sold except in certain designated quantities?

Again, is it within the legitimate exercise of legislative power to prescribe, as is attempted to be done in § 2 of the act, a different classification as to the lard industry from that prescribed for all other industries in §§ 1 and 3 thereof, the former relating generally to all articles of food and beverages, and the latter specifically relating to bread? By §§ 1 and 3 no restrictions whatever are placed upon the size of the packages. All food products, except lard, may be sold in any quantity, provided that the net weight of the contents of such packages, excluding the wrapper, is "stated in terms of pounds, ounces, and grains avoirdupois weight," or in case of articles sold by measure, is stated in "terms of gallons of 231 cubic inches or fractions thereof, as quarts,

pints, and ounces." And bread is authorized to be sold in whole, half, and quarter loaves, and, "when plainly labeled with the exact weight thereof," may be sold in any size or quantity. In other words, lard is singled out from among all the food products and beverages, and placed in a class by itself in so far as the quantity which may be sold in a package is concerned. Why the legislature deemed such a distinction necessary I am wholly at a loss to understand. Neither the majority of the court nor counsel for the state have advanced any reasonable explanation for such discrimination, and I am forced to the conclusion that the attempted classification rests upon no natural nor reasonable ground, but is manifestly purely arbitrary and capricious. This appears so palpable and self-evident to my mind after due reflection, that I have no hesitancy, for this reason alone, in pronouncing the act unconstitutional and void upon its face. In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, the court on this question said: "We recognize fully the right of the general assembly, . . . to prescribe weights and measures, and to enforce their use in proper cases; but we do not think that the general assembly has power to deny to persons in one kind of business the privilege to contract for labor and to sell their products without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege, there being nothing in the business itself to distinguish it in this respect from any other kind of business."

As we have seen, the so-called police power of a state does not confer upon the legislature an absolutely free hand in prescribing rules and regulations of the character in question. Legitimate business transactions cannot be hampered or restricted or otherwise interfered with by the legislature, except to the extent reasonably required for the proper protection of the public interests or the public welfare. If the attempted police regulation clearly extends beyond the supposed threatened evil, and is manifestly capricious and wholly arbitrary, it, to that extent, constitutes an unwarranted interference with the rights of the citizens to contract, and it becomes the plain duty of the courts to interfere by adjudging such attempted regulation void.

The act in question deals confessedly with a legitimate trade industry, and the only possible justification for the attempted regulation is upon the ground that it is necessary to prevent fraud. But, as before

stated, I am wholly unable to perceive how the enforcement of such new statutory restriction will, or possibly can, operate in the least degree to this end. And moreover, conceding that it will to some slight degree thus operate, is this not manifestly true as to all other staple food products covered by the act? Is there, in the nature or character of the lard industry, anything to differentiate it in the manner here attempted from the many other food industries sufficient to warrant a special rule applicable alone to the former? I think not, and this unwarranted discrimination is alone sufficient to condemn the statute.

My attention has been called to no statute elsewhere under which such an exercise of the police power has been attempted by any legislature. A statute in Tennessee which was upheld by the supreme court of that state in the case of *State v. Co-operative Store Co.* 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248, is the nearest like the act in question of any I have discovered. The statute there in question made it unlawful for any person "to pack for sale, sell, or offer for sale in this state any corn meal except in bags or packages containing by standard weight 2 bushels or 1 bushel or $\frac{1}{2}$ bushel or $\frac{1}{4}$ bushel or $\frac{1}{8}$ bushel respectively." Such act also provided that "each bag or package of corn meal shall have plainly printed or marked thereon, . . . the amount it contains in bushels or fraction of a bushel, and the weight in pounds: Provided, the provisions of this section shall not apply to the retailing of meal direct to consumers from bulk stock when priced and delivered by actual weight or measure." A violation thereof was made a misdemeanor. In sustaining the law against an attack upon the ground that it attempts to abridge the right of persons to contract, and deprives them of their liberty and property without due process of law, the court, among other things, said: "The object of this statute, is the prevention of fraud in the sale of one of the most common articles of commerce and food. *The fraudulent practice sought to be suppressed is the sale of packages of corn meal, purporting, expressly or by implication, to contain certain weights and measures for which the purchaser is charged, when in fact they contain less quantities, whereby the public is deceived and defrauded to the extent of the deficiency in weight or measure of the package purchased.* The prevention of fraud in general has always been recognized as well within the police power. Statutes enacted for this purpose, and which have a fair, just, and reasonable

relation to the preservation of the lives, health, morals, and general welfare of the public, do not contravene the constitutional provisions here relied upon, although they may interfere to some extent with individual liberty and the free use and enjoyment of private property."

I have no quarrel with the reasoning or conclusion of that able court in the light of the facts of that case, but the statute in the case at bar is plainly distinguishable from the Tennessee act in at least one important particular. At the time of the passage of the Tennessee law there was a well-recognized evil to be remedied. The act conclusively shows this by the language therein, "that whereas the practice in this state of putting up and selling meal in shortweight packages is against the public welfare and the interest of legitimate trade." The portion of the above-quoted opinion also expressly recognizes the existence of such fraudulent practice. It is to be noted, also, that the points that the act was an unnecessary and unreasonable exercise of the police power of the state, and that the same constituted an unwarranted discrimination and was class legislation, were not urged or raised by the defense. An entirely different situation is presented in the case at bar, as already observed. None of the numerous authorities cited and relied upon by the Tennessee court involved facts parallel with those in the case at bar, and I am satisfied that the North Dakota statute is, in the light of the undisputed facts, unique in the history of such legislation.

The contention that purchasers are or may be deceived in the quantity of lard purchased where the pails are not of the size prescribed in this act is, I think, not tenable; for, as above stated, the true net weight is required to be plainly stated on the outside wrapper of each pail. At least, this is all that in reason ought to be required in order to furnish such information, where, as appears here, no actual or attempted fraud or deception has ever been practised by the manufacturers or vendors of lard in this form. It is difficult to comprehend how such deception can occur to any appreciable extent, but if it does, how is the purchaser injured thereby when he gets all the lard which he pays for? The fact that he is, in addition, required to pay for the container and wrapper, and the added expense of putting it up in this sanitary form, affords no just ground for complaint, nor does it justify the act in question. This is true as to any sized pail, and is according to a long and well-

established general custom of the trade of which he is presumed to have knowledge.

In *State v. Hanson*, 118 Minn. 85, 40 L.R.A.(N.S.) 865, 136 N. W. 412, Ann. Cas. 1913E, 405, a statute providing in substance that no person, firm, or corporation shall manufacture or sell oleomargarine which shall be in imitation of butter of any shade or tint of yellow, unless such oleomargarine shall be made and kept free from all coloration or ingredients causing it to look like butter of any shade or tint of yellow, nor unless the same shall be kept and presented in a separate and distinct form, and in such manner as will advise the purchaser and consumer of its real character, was held unconstitutional for reasons therein stated. The decision is not particularly in point here, but I think certain reasoning in the opinion lends support to my views as above stated. I quote: "We construe the law, therefore, as making criminal the sale or manufacture of oleomargarine purposely made of any shade or tint of yellow, whether the tint or shade be dark yellow, golden, or light yellow. Even as so construed, § 1 of the law might be sustained as a valid exercise of the police power, if it made proof of an intent to deceive or defraud the purchaser or consumer essential to a conviction. And it would be immaterial that no artificial coloring was used, or that the product was entirely wholesome, was exactly like butter in taste, or was in fact butter. The purchaser is entitled to know what he is buying; and any law enacted to prevent fraud or deceit, and having any fair tendency in that direction, would be valid. But this law does not make the intent to deceive or defraud essential to a conviction of a violation of § 1. Intentionally making oleomargarine of a shade or tint of yellow is made criminal, without proof of an intent to deceive. This being so, the law cannot be sustained, unless there is a reasonable probability that the purchaser or consumer will be deceived by the yellow shade or tint into buying or eating oleomargarine, mistaking it for butter. . . . The power of the legislature to regulate its manufacture and sale rests, not upon the right to legislate in the interest of the public health, but upon the undoubted right to enact laws to protect the public against fraud and deception, to suppress false pretenses, and promote fair dealing in an article of food. But we are quite unable to perceive how there is any but a remote possibility of deceiving the purchaser or consumer by making oleomargarine imitate butter in color, whether

it be a conscious or accidental imitation. The intent to make oleomargarine of a shade or tint of yellow by the selection of ingredients is no evidence of an intent to deceive either purchaser or consumer. Oleomargarine is made to resemble butter of a yellow color, not to deceive anybody, but because the public buys the substitute if it has the yellow shade, but refuses to buy it if it has a light shade. The intent is not to deceive the public, but to make an article which will find a market. It seems clear, not only that there was no intent to defraud or deceive, but that the color of the product has, in view of the stringent provisions of the law that clearly tend to prevent deception, no fair tendency to make either purchaser or consumer mistake oleomargarine for butter."

The court then refers to the provisions of law relating to placards upon the tubs or packages in which it is exposed for sale, to the wrappers, stamped with the word "oleomargarine," in which the retail dealer is required to deliver it to the purchaser, and other like provisions and says: "It may be suggested that the guests of a private housekeeper have not this protection, or that store, hotel, or restaurant proprietors may not obey the law as to placards, or that a purchaser who cannot read may be deceived. But, granting that there may be a few instances where, by mistake, the consumer may take into his system oleomargarine, when he thinks he is eating butter, does this furnish a ground upon which the legislature can prohibit the manufacture and sale of a perfectly wholesome and healthful article of food? On the record before us, such a deception would be wholly without damage. In its last analysis, it is a mere matter of sentiment."

In a prior portion of the opinion it is also said: "There can be, however, no intent to deceive the purchaser or consumer, as the provisions of the law concerning labels on packages and wrappers are fully complied with. It is utterly impossible for the purchaser to be deceived."

The majority opinion cites certain decisions upholding the validity of ordinances prescribing the weight of loaves of bread. *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609, is one of the cases cited, but I find in the opinion the following language, which serves to differentiate this case from the case at bar. I quote: "Sales are invariably made in loaves of the size of 1, 2, or 4 pound packages, and the ordinance simply takes the usual and ordinary

package or loaves in which bread is made and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf."

In the case at bar the undisputed proof shows a well-established custom in the lard industry to put lard up in pails of the size of 3, 5, 10, and 20 pounds *gross weight*, but containing a label showing their net weight. The legislature, therefore, by § 2 of the act in question, has not attempted to standardize these packages in accord with such general established custom, but it seeks to force a radical departure therefrom, without the least resulting benefit to anyone. It is to be observed that by § 1 the legislature has, on the contrary, recognized the existing general trade custom as to all other food products as to weight, measure, and numerical count.

I have examined the opinions in the other so-called bread cases relied on, and I think practically all, if not all, of them may be differentiated in like manner from the case at bar.

In this connection see *Buffalo v. Collins Baking Co.* 39 App. Div. 432, 57 N. Y. Supp. 347, where the court upheld the lower court's decision reported in 24 Misc. 745, 53 N. Y. Supp. 968, holding an ordinance fixing the weight of loaves of bread at not less than 1½ pounds each, and prohibiting sales thereof in any other size, to be unconstitutional and void, under facts quite analogous to those in the case at bar, as an unreasonable exercise of the police power, and an unwarranted interference with the rights of persons engaged in a legitimate business. I think the reasoning and conclusion of the court are sound, both on principle and authority.

I think that the portion of the act here in question is unconstitutional, and that it is our plain duty to so decide.

In what I have above stated I do not wish to be understood as holding that this whole act is unconstitutional, but merely that portion of § 2 prescribing the sizes of the pails or packages. The objectionable feature may be eliminated without affecting the balance of the Act.

I think the judgment should be reversed.

SPALDING, Ch. J. I concur in the above.

On Petition for Rehearing.

Appellant has filed a petition for rehearing, in which he complains that this court has not passed upon the sufficiency of the information. The court had received the impression that this was a friendly suit to determine the constitutionality of the 1911 law, and that no ruling was desired upon minor questions. However, we are and always have been satisfied that the amended information states an offense, and the demurrer was properly overruled.

The petition for rehearing also complains because the case of *Mc Dermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, was not discussed. This court believes that such decision is not in point. The gist of its ruling is that a state may not exercise its police power in intrastate matters in such a way that it in effect interferes with interstate commerce. The Illinois manufacturer wished to ship an article from Illinois to Wisconsin, and was obliged to use the United States label in order to cross the state line. The minute that he crossed the state line, the Wisconsin law required him to remove the United States label and substitute another. Thus the Wisconsin law, though pretending to regulate local commerce, in effect prohibited commerce from Illinois to Wisconsin. In the case at bar the only hardship imposed upon the foreign shipper is an increase in cost, according to its own evidence, of $1\frac{1}{2}$ cents per pound, upon its lard in pails. This additional expense likewise falls upon a local manufacturer, so that there is no discrimination against the shipper from another state.

We might also state that Professor Ladd knew the exact amount of lard that he was buying, and that he was not deceived in any manner by appellant. On the contrary all the evidence points to the conclusion that the sale, arrest, and nominal fine were pursuant to an understanding between the pure food commissioner and the defendant, in order that the law might be tested in the courts.

The petition for rehearing is denied. **BURKE, BRUCE, GOSS, JJ.**

27 N. D.—15.

C. ERTELT v. THOMAS C. LILLETHUN, Fred Daniels, Richard Adcock and Christ Myrhow, Appellants.

(145 N. W. 825.)

Warehouseman's bond — action on — benefit of all persons injured — resources of bond — conservation — suits — multiplicity.

The action upon a warehouseman's bond should be brought for the benefit of all persons injured, in order to converse the resources of the bond and prevent multiplicity of suits. *Phillips v. Semingson*, 25 N. D. 460, 142 N. W. 47, followed.

Opinion filed February 19, 1914.

Appeal from the District Court of Barnes County, *Coffey, J.*
Reversed.

Page & Englert, of Valley City, North Dakota, for appellants.

Herman Winterer and *D. S. Ritchie*, of Valley City, North Dakota, for respondent.

PER CURIAM. Plaintiff brings action upon an elevator warehouse's bond, the breach alleged being the failure to account for grains stored with the warehouseman. The complaint does not state that the action was brought upon behalf of himself and others similarly situated, or that the action was brought to protect the holders of outstanding tickets. There are four similar suits before this court upon appeal, and we understand that there are others pending in the district court. At the trial defendants demurred upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. Appellants filed a supplemental brief dated May 15, 1913, from which we quote: "We doubt very much whether the plaintiff in this case, under this bond and under the statutes, is the real party in interest for another reason. Section 2247 of the 1905 Code provides that the bond 'shall be in a sufficient amount to protect the holders of outstanding tickets.' It is evidently the object of this statute to prevent a multiplicity of suits. It must also be the object of this statute to prevent any single person from reaping the entire benefit of the bond, and thus cut off all other parties that might be similarly situated, and that might have met similar losses

under like circumstances. If our view upon the intention of the law in this regard is correct, then for an equally weighty or important reason might we say that the action should be brought in the name of the state of North Dakota, as a trustee of those that have sustained losses. It is undoubtedly for this reason that the liability is directed to the state of North Dakota to thus enable it to protect those that have sustained losses, in a just and equitable manner, and not for the benefit of one to the absolute and unrestrained detriment of the others. We raised these points on our demurrer to the complaint, and we again raised these points on our motion for a directed verdict at the close of the case." On May 24, 1913, this court filed the opinion in *Phillips v. Semingson*, 25 N. D. 460, 142 N. W. 47, upon almost identical facts, sustaining the contention of appellants in this case. The facts in this case furnish an additional reason for upholding the doctrine announced in the above-named case. Here we have a \$5,000 bond upon which are based six or seven different suits. If the four cases before us were sustained, the costs would amount to a material proportion of the bond, and might easily result in actual loss to holders of outstanding storage tickets. It seems clear that but one suit should be brought, and that for the benefit of all parties injured, thus conserving the resources of the bond and preventing multiplicity of suits. The evidence before us shows a liability upon the bond, but this liability is to all of the outstanding ticket holders, and not to the most vigilant. The demurrer should have been sustained.

In justice to the trial court it should be noted that his rulings were rendered prior to the decision in *Phillips v. Semingson*.

JOHN GRUMAN et al. v. THOMAS C. LILLETHUN, Fred Daniels, Defendants and Richard Adcock, and Christ Myrhow, Appellants.

(145 N. W. 825.)

Warehouseman's bond — action on — benefit of all persons injured — resources of bond — conservation — suits — multiplicity.

The action upon a warehouseman's bond should be brought for the benefit of all persons injured, in order to conserve the resources of the bond and

prevent multiplicity of suits. *Phillips v. Semingson*, 25 N. D. 460, 142 N. W. 47, followed.

Opinion filed February 19, 1914.

Appeal from the District Court of Barnes County, *Coffey, J.*
Reversed.

Page & Englert, of Valley City, North Dakota, for appellants.

Herman Winterer and *D. S. Ritchie*, of Valley City, North Dakota,
for respondents.

PER CURIAM. Plaintiffs bring this action upon an elevator warehouseman's bond, the breach alleged being the failure to account for grains stored with the warehouseman. The complaint does not state that the action was brought upon behalf of himself and others similarly situated, or that the action was brought to protect the holders of outstanding tickets. There are four similar suits before this court upon appeal, and we understand that there are others pending in the district court. At the trial defendants demurred upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. Appellants filed a supplemental brief dated May 15, 1913, from which we quote: "We doubt very much whether the plaintiff in this case, under this bond and under the statutes, is the real party in interest for another reason. Section 2247 of the 1905 Code provides that the bond 'shall be in a sufficient amount to protect the holders of outstanding tickets.' It is evidently the object of this statute to prevent a multiplicity of suits. It must also be the object of this statute to prevent any single person from reaping the entire benefit of the bond, and thus cut off all other parties that might be similarly situated and that might have met similar losses under like circumstances. If our view upon the intention of the law in this regard is correct, then for an equally weighty or important reason might we say that the action should be brought in the name of the state of North Dakota, as a trustee of those that have sustained losses. It is undoubtedly for this reason that the liability is directed to the state of North Dakota to thus enable it to protect those that have sustained losses, in a just and equitable manner, and not for the benefit of one, to the absolute and unrestrained detriment of the others. We raised these points on our demurrer to the com-

plaint, and we again raised these points on our motion for a directed verdict at the close of the case." On May 24, 1913, this court filed the opinion in Phillips v. Semingson, 25 N. D. 460, 142 N. W. 47, upon almost identical facts, sustaining the contention of appellants in this case. The facts in this case furnish an additional reason for upholding the doctrine announced in the above named case. Here we have a \$5,000 bond upon which are based six or seven different suits. If the four cases before us were sustained, the costs would amount to a material proportion of the bond, and might easily result in actual loss to holders of outstanding storage tickets. It seems clear that but one suit should be brought and that for the benefit of all parties injured, thus conserving the resources of the bond and preventing multiplicity of suits. The evidence before us shows a liability upon the bond, but this liability is to all of the outstanding ticket holders, and not to the most vigilant. The demurrer should have been sustained.

In justice to the trial court it should be noted that his rulings were rendered prior to the decision in Phillips v. Semingson.

JOSEPH KUNZE v. THOMAS C. LILLETHUN, Fred Daniels,
Defendants, Richard Adcock, and Christ Myrhow, Appellants.

(145 N. W. 825.)

**Warehouseman's bond — action on — benefit of all persons injured —
resources of bond — conservation — suits — multiplicity.**

The action upon a warehouseman's bond should be brought for the benefit of all persons injured, in order to conserve the resources of the bond and prevent multiplicity of suits. Phillips v. Semingson, 25 N. D. 460, 142 N. W. 47, followed.

Opinion filed February 19, 1914.

Appeal from the District Court of Barnes County, Coffey, J.
Reversed.

Page & Englert, of Valley City, North Dakota, for appellants.
Herman Winterer and D. S. Ritchie, of Valley City, North Dakota,
for respondent.

PER CURIAM. Plaintiff brings action upon an elevator warehouseman's bond, the breach alleged being the failure to account for grains stored with the warehouseman. The complaint does not state that the action was brought upon behalf of himself and others similarly situated, or that the action was brought to protect the holders of outstanding tickets. There are four similar suits before this court upon appeal, and we understand that there are others pending in the district court. At the trial defendants demurred upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. Appellants filed a supplemental brief dated May 15, 1913, from which we quote: "We doubt very much whether the plaintiff in this case, under this bond and under the statutes, is the real party in interest for another reason. Section 2247 of the 1905 Code provides that the bond 'shall be in a sufficient amount to protect the holders of outstanding tickets.' It is evidently the object of this statute to prevent a multiplicity of suits. It must also be the object of this statute to prevent any single person from reaping the entire benefit of the bond, and thus cut off other parties that might be similarly situated and that might have met similar losses under like circumstances. If our view upon the intention of the law in this regard is correct, then for an equally weighty or important reason might we say that the action should be brought in the name of the state of North Dakota, as a trustee of those that have sustained losses. It is undoubtedly for this reason that the liability is directed to the state of North Dakota to thus enable it to protect those that have sustained losses, in a just and equitable manner, and not for the benefit of one, to the absolute and unrestrained detriment of the others. We raised these points on our demurrer to the complaint, and we again raised these points on our motion for a directed verdict at the close of the case." On May 24, 1913, this court filed the opinion in *Phillips v. Semingson*, 25 N. D. 460, 142 N. W. 47, upon almost identical facts sustaining the contention of appellants in this case. The facts in this case furnish an additional reason for upholding the doctrine announced in the above-named case. Here we have a \$5,000 bond upon which are based six or seven different suits. If the four cases before us were sustained, the costs would amount to a material proportion of the bond, and might easily result in actual loss to holders of outstanding storage tickets. It seems clear that but one suit should

be brought and that for the benefit of all parties injured, thus conserving the resources of the bond and preventing multiplicity of suits. The evidence before us shows a liability upon the bond, but this liability is to all of the outstanding ticket holders, and not to the most vigilant. The demurrer should have been sustained.

In justice to the trial court it should be noted that his rulings were rendered prior to the decision in *Phillips v. Semingson*.

ALBERT GRESENS v. A. MARTIN.

(145 N. W. 823.)

Suits in equity — jury trial — constitutional provisions — statutory provisions — issues — courts — jury — verdict — advisory.

1. In the absence of express constitutional or statutory provision, there is no right to a jury trial in suits in equity. It has always been the province of the courts of equity to determine issues of fact as well as of law, and while the court may submit questions of fact to a jury, this is purely a matter of discretion, and the verdict in such cases is purely advisory.

Issue of law — tried by court — judge — issue of fact — jury.

2. This is also the rule under § 7009, Rev. Codes 1905, which provides that "an issue of law must be tried by the court or by the judge. An issue of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial is waived as provided in § 7038, or a reference is ordered as provided in §§ 7046 and 7047. Every other issue is triable by the court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury or by a referee, as provided in §§ 7046 and 7047."

Chattel mortgage — action to foreclose — equitable — answer — issue of law — jury trial.

3. An action to foreclose a chattel mortgage is essentially a suit in equity, and the same cannot be transformed into an action at law by merely raising an issue of law as the defense in the answer. The interposition of such a defense, therefore, does not secure to the defendant the right to a trial by jury of the legal defenses pleaded.

Opinion filed March 2, 1914.

Appeal from the District Court of Rolette County, *Cowan, J.*

Action to foreclose a chattel mortgage. Judgment for plaintiff.
Defendant appeals.
Affirmed.

Statement by BRUCE, J.

The complaint in this action set out the making and delivery of two promissory notes, that to secure the same a chattel mortgage had been executed by the defendant, and prayed for a foreclosure of the mortgage. Defendant in his answer admitted the execution and delivery of the notes and of the chattel mortgage, but claimed that the notes were given in settlement of the purchase price of an engine, that there was fraud in their obtaining, and a breach of warranty in regard to the machine, also a subsequent agreement with one John Gresens, to whom one of the notes was originally made, said note being subsequently transferred to the plaintiff, whereby the defendant was to sell and dispose of the engine as best he could, and keep enough money out of the sale to reimburse him for his trouble in making the same and for a payment that he had already made to the said Gresens on the said machine. There was also a claim that the plaintiff, the assignee of the Gresens' note, was not an innocent purchaser for value. At the beginning of the trial the defendant demanded a jury. This motion was denied. It was renewed at the end of the plaintiff's case, and for the purpose of trying the issues set out in the answer, but was again overruled. The only question to be determined upon this appeal is the determination of the trial court upon these matters; that is to say, whether or not the defendant was entitled to a jury to try the issues raised by the answer.

William Bateson, for appellant.

The only issues for trial were issues of law raised by defendant's answer, and were triable by jury, and defendant had not waived a jury. Rev. Codes 1905, § 7009; *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037; *Suessenbach v. First Nat. Bank*, 5 Dak. 477, 41 N. W. 662; *George v. Silva*, 68 Cal. 272, 9 Pac. 257; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; 7 Enc. Pl. & Pr. 810, 811; *Rudisill v. Whitener*, 146 N. C. 403, 15 L.R.A.(N.S.) 81, 59 S. E. 995.

Flynn & Traynor, for respondent.

Defendant was not entitled to a jury trial. A case properly in equity

cannot be transformed into a *law* case, by the filing of answer which raises an issue. *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743; *Avery Mfg. Co. v. Crumb*, 14 N. D. 57, 103 N. W. 410; *Peckham v. Van Bergen*, 8 N. D. 595, 80 N. W. 759; *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012; 24 Cyc. 111; 12 Enc. Pl. & Pr. 239; 9 Enc. Pl. & Pr. 396; 24 Cyc. 127 (h); 6 Am. & Eng. Enc. Law, 976.

While the court may submit questions of fact in equity cases to a jury, this is wholly discretionary, and the verdict in such cases is merely advisory. *Wilson v. Johnson*, 74 Wis. 337, 43 N. W. 148; *Downing v. Le Du*, 82 Cal. 471, 23 Pac. 202; *Leach v. Kundson*, 97 Iowa, 643, 66 N. W. 913; *Installment Bldg. & Loan Co. v. Wentworth*, 1 Wash. 467, 25 Pac. 298; *Cole v. Bean*, 1 Ariz. 377, 25 Pac. 538; *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. 383; *Dohle v. Omaha Foundry & Mach. Co.* 15 Neb. 436, 19 N. W. 644; *Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384; *Sharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727; *Daniels v. Mutual Ben. L. Ins. Co.* 73 Neb. 257, 102 N. W. 458; *Morgan v. Field*, 35 Kan. 162, 10 Pac. 448.

BRUCE, J. (after stating the facts as above). The defendant and appellant contends that he admitted all of the allegations of the complaint in his answer, but set up an independent or affirmative action by way of defense of a breach of warranty, and that consequently there was no equitable issue left to be tried by the court. The existence and validity of the chattel mortgage and of plaintiff's right to foreclose the same were, he says, secondary matters in the action which could not be adjudicated until the question of the liability of the defendant to the plaintiff in some amount had been determined. He states that § 7009, Rev. Codes 1905, provides, among other things, that "an issue of fact in an action for the recovery of money only must be tried by a jury," and that in the case at bar the first question to be decided and adjudicated was whether or not the defendant was indebted in any sum to the plaintiff. He maintains that only after such a finding by a jury was it competent for the court sitting as a court of equity to adjudicate the matter of the foreclosure of the chattel mortgage. He contends that had the action been started on the law side of the court, and the equitable issues raised by the answer, the correct practice would have

been for the court first to decide all the equitable issues, and then, if there remained any more issues to be disposed of, to call a jury for the purpose of deciding the facts on the law side of the court. He maintains that such being the case, a jury cannot be denied when demanded in an action where the complaint raises the equitable, and the answer the legal, issues.

We concede the correctness of plaintiff's premise, that had the action been started on the law side of the court and the equity issues raised by the answer, the correct practice would have been for the court to first decide all of the equitable issues, and then if there remained any more issues to be disposed of, to call a jury for the purpose of deciding the facts on the law side of the court. See *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; *Sussenbach v. First Nat. Bank*, 5 Dak. 504, 41 N. W. 662. We cannot, however, agree with his conclusion that "such being the case, a jury cannot be denied when demanded in an action where the complaint raises the equitable and the answer the legal issues." Section 7009, Rev. Codes 1905, provides that "an issue of law must be tried by the court or by the judge. An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial is waived as provided in § 7038, or a reference is ordered as provided in §§ 7046 and 7047. Every other issue is triable by the court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury or by a referee, as provided in §§ 7046 and 7047." It will be noted that this section merely provides for a jury as a matter of right "in an action for the recovery of money only or of specific real or personal property." An action for the foreclosure of a chattel mortgage is not "an action for the recovery of money only or of specific, real or personal property." The rule as laid down in the books is practically that given in 24 Cyc., page 111, where it is said that, "in the absence of express constitutional or statutory provision, there is no right to a jury trial in suits in equity. It has always been the province of the court in equity to determine issues of fact as well as of law; and while the court may submit questions of fact to the jury, this is purely a matter of discretion, and the verdict in such cases is merely advisory." See also 12 Enc. Pl. & Pr. 239; 9 Enc. Pl. & Pr. 396; 24 Cyc. 127(h); 6 Am. & Eng. Enc. Law, 976.

It seems also to be well established that an action to foreclose a chattel mortgage is essentially a suit in equity, and that the same cannot be transformed into an action at law by merely raising an issue of law as a defense in the answer, and this even if we admit that a defense of fraud or failure of consideration is in such cases a strictly legal defense, which we are far from doing. *Schumacher v. Crane-Churchill Co.* 66 Neb. 440, 92 N. W. 609; *Albin v. Parmele*, 73 Neb. 663, 103 N. W. 304; *Daniels v. Mutual Ben. L. Ins. Co.* 73 Neb. 257, 102 N. W. 458; *Wilson v. Johnson*, 74 Wis. 337, 43 N. W. 148; *Downing v. LeDu*, 82 Cal. 471, 23 Pac. 202; *Leach v. Kundson*, 97 Iowa, 643, 66 N. W. 913; *Installment Bldg. & Loan Co. v. Wentworth*, 1 Wash. 467, 25 Pac. 298; *Cole v. Bean*, 1 Ariz. 377, 25 Pac. 538; *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. 383; *Dohle v. Omaha Foundry Co.* 15 Neb. 436, 19 N. W. 644; *Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384; *Sharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727; *Morgan v. Field*, 35 Kan. 162, 10 Pac. 448; *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743; *Avery Mfg. Co. v. Crumb*, 14 N. D. 57, 103 N. W. 410; *Peckham v. Van Bergen*, 8 N. D. 595, 80 N. W. 759; *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012.

Under these authorities and under § 7009, Rev. Codes 1905, it may have been within the power of the court to have ordered the specific questions of fact tried by a jury; but in such a case the verdict of the jury would have been advisory merely, and as to whether a jury should have been summoned or not was a matter purely within the discretion of the trial court.

The judgment of the District Court is affirmed.

A. B. HERRMANN v. MINNEKOTA ELEVATOR COMPANY,
a Corporation.

(145 N. W. 821.)

Evidence — crop — written lease — hold over.

1. Evidence examined and *held*, that one T. raised the crop in litigation as a hold over under a prior written lease. Section 5531, Rev. Codes 1905, governing in the case.

Evidence — grain — division of — sale.

2. Evidence examined and *held*, that no division of the grain was made prior to the sale thereof to the defendant elevator company. *Bidgood v. Monarch Elevator Co.* 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561, cited and followed.

Conversations and statements — parties — effect of — judgment.

3. Certain conversations and statements with and by the officers of the bank which owned the land, examined, and *held*, not binding upon the defendant elevator company. Judgment should have been directed in favor of the defendant.

Opinion filed February 11, 1914. Rehearing denied March 2, 1914.

Appealed from the County Court of Benson County, *Liles, J.*
Reversed.

F. B. Lambert, for appellant.

Statements made by outside, disinterested parties are wholly incompetent and immaterial; to make a person a party to an action, service of the summons upon him is necessary. *Bunker v. Taylor*, 10 S. D. 526, 74 N. W. 450.

Tetrault was a hold over under the old lease, and the rights of the parties are fixed and controlled by such lease. *Wadsworth v. Owens*, 21 N. D. 255, 130 N. W. 932.

The grain had never *been divided* so as to change the vested title. *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547; *Smith v. Atkins*, 18 Vt. 461; *Esdon v. Colburn*, 28 Vt. 632, 67 Am. Dec. 730; *Andrew v. Newcomb*, 32 N. Y. 417; *Consolidated Land & Irrig. Co. v. Hawley*, 7 S. D. 229, 63 N. W. 904; *Moulton v. Robinson*, 27 N. H. 550; *Lewis v. Lyman*, 22 Pick. 437; *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Griswold v. Cook*, 46 Conn. 198; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Lloyd v. Powers*, 4 Dak. 62, 22 N. W. 492; *Meacham v. Herndon*, 86 Tenn. 366, 6 S. W. 741; *Bidgood v. Monarch Elevator Co.* 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304; *Wadsworth v. Owens*, 21 N. D. 255, 130 N. W. 932.

The title to the grain under the contract in this case remained in the owner of the land until an actual division of the grain. *Walton v. Mattson*, 22 N. D. 532, 135 N. W. 176.

Demand and refusal are necessary in all trover cases, where defend-

ant is *rightfully* in possession. 38 Cyc. 2032, note 75; cases from Ala.; Ark.; Colo.; Conn.; Ga.; Ill.; Ind.; Iowa; Kan.; Ky.; Me.; Mass.; Mo.; N. J.; N. Y.; N. C.; Ohio; Pa.; Tenn.; Wis.; U. S.; Eng. and Canada. *Smith v. Smalley*, 19 App. Div. 519, 46 N. Y. Supp. 279; *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434; *Shinn, Replevin*, § 295, and cases cited in note 2; 38 Cyc. 2068, citing cases from Ala.; Cal.; Ind.; Ind. Terr.; Iowa; Mass.; Mich.; Mo.; Mont.; Neb.; N. Y.; N. C.; N. D.; Or.; S. D.; Wis.; U. S.; Kan.; R. I.; *Citizens Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266.

Flynn & Traynor, for respondent.

The bank is estopped to claim a superior title to *Tetrault's* half of the grain, over plaintiff's mortgage, because of the representations of *Edwards* to *Hermann* the preceding winter, to the effect that *Hermann's* mortgage thereon was a *first* mortgage—and there followed an actual division of the grain. The tenant is the absolute owner of the crop unless title is reserved in the owner of the land. 24 Cyc. 1067.

If the landowner retains title, he can pass it to the tenant, even though the tenant has failed to perform the contract. *Lallier v. Pacific Elevator Co.* 25 S. D. 572, 127 N. W. 558.

If the acts in themselves constitute a conversion, no *demand* is necessary. *Taugher v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 750; *More v. Burger*, 15 N. D. 345, 107 N. W. 200.

Especially is no demand necessary where it would be unavailing. *Hahn v. Sleepy Eye Mill. Co.* 21 S. D. 324, 112 N. W. 843; *Consolidated Land & Irrig. Co. v. Hawley*, 7 S. D. 229, 63 N. W. 904; *Willard v. Monarch Elevator Co.* 10 N. D. 400, 87 N. W. 996.

BURKE, J. In 1908 one *Wright* owned a quarter section of land in *Rolette* county, North Dakota, and made a written lease with one *Tetrault* to farm the same during the years 1908, 9, 10, which lease reserved the title in the landlord to all crops until a division thereof. In August, 1909, *Wright* sold the land to *Dr. Robertson*, and he, in October 1910, deeded it to the *First National Bank of Rolette*, of which he was vice-president and for whom he had previously held the title. During the years 1909 and 1910 the bank assumed the lease with *Tetrault*, and after a division of the grain turned one half over to said

tenant. On November 1, 1910, Tetrault, the tenant, executed a chattel mortgage to the plaintiff herein, Herrmann covering his interest in the 1911 crop upon said land.

Tetrault farmed the land in 1911 without any further written lease, and much of the dispute in this case hinges upon the nature of such lease. The plaintiff contends that a new verbal lease was made for the year 1911, while the defendant maintains that Tetrault held over under the old written lease. The decision of this question is discussed in ¶ 1 of this opinion. When the time for threshing the grain arrived, the same was delivered to the defendant elevator company, a load at a time, and mingled with grains received from other farmers. After the first day's hauling the amount, 458 bushels and 40 pounds, No. 2, wheat was sold at 94 cents per bushel, the check being taken in the name of Dr. Robertson. The second and last day, 494 bushels and 10 pounds of No. 2 wheat was delivered and sold at 92 cents per bushel. Another important question in this lawsuit depends on whether or not there was a division of the grain at the time of the sale, and this proposition is discussed in ¶ 2 of the opinion. The third and last question necessary for a decision of this case is whether or not the bank has been estopped by admissions by its officers, to deny the fact of an oral lease, and also the fact of a division of the grain, and this will be discussed in ¶ 3.

(1) Section 5531, Rev. Codes 1905 provides: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time not exceeding one year." It is undisputed that Tetrault farmed the land in 1909 and 1910 under the written lease, and that he continued in possession of the farm during the year 1911, under practically the same terms. The president of the bank testified at the trial that he had full and active management for the bank of this particular tract of land, and personally conducted all negotiations to the same with Tetrault; that in the fall of the year 1910 in a conversation with Tetrault he had stated to him that he could go on farming said land for another year under the same terms and conditions as the old lease, and that pursuant to this conversation the bank had furnished seed, paid one half of the threshing bill, and otherwise conducted itself under the terms of the old written lease.

Tetrault did not testify in the case, and the only evidence upon which the plaintiff can rely is some alleged admissions of Dr. Robertson, the vice-president, and Mr. Edwards, president, of the bank, which statements were testified to by the plaintiff himself, and were received in evidence over the objection of the defendant. Herrmann testified that in February, 1911, he noticed Tetrault hauling seed grain out to the place, and went to Edwards and asked him if he was furnishing Tetrault with any grain that had been charged up against his half of the crop for that year, and Edwards had said, "no," after which he told Edwards that Tetrault had told him that there was a verbal lease under which Tetrault was to receive one half of the grain, and that he had taken a mortgage upon that half, and asked him how things stood, and that Edwards had said that there would be nothing charged against the Tetrault interest, and that his mortgage would be a first lien on his half of the crop. Plaintiff also testified that he had a talk with Dr. Robertson just after the grain was sold, in which Robertson had told him that he had instructed the elevator agent to sell every other load for him and leave the other for Tetrault. Upon the question of the nature of the lease, we can see nothing inconsistent with the defendant's claim in the conversation between Edwards and Herrmann, and in view of the positive evidence of Edwards that the 1911 lease was a renewal of the old written lease, we think the undisputed evidence shows such to be the case and the relation of the parties herein to be exactly the same as though this dispute had arisen over the 1910 crop. The conversation with Robertson has nothing to do with this phase of the dispute, and will be treated in ¶ 3. Therefore the court should have instructed that the lease in dispute was a continuation of the written lease of 1908 and 1909, and withdrawn from their consideration the question of a different oral lease.

(2) Plaintiff insists that even if it be conceded that the 1911 lease was a continuation of the old written lease and contained a reservation of title in the bank until a division, still there is evidence of a division of the crops sufficient to take this question to the jury. Again, all of the positive evidence favors the defendant, and plaintiff is obliged to rely upon the admissions of Dr. Robertson to substantiate his contention. The elevator agent who bought the grain testifies positively that there was no division thereof until after the sale at least; that the teams began

hauling upon September 25, Tetrault driving one of the teams, and that the grain was commingled with other grains, and that all of the grain was entered in Dr. Robertson's name in the scale book. He further testifies that at the close of that day he sold all the grain received, at Dr. Robertson's request and gave him the cash ticket therefor. Upon Monday the 27th, more grain was hauled to the elevator, and sold under the bank's directions without Tetrault being present. True, the cash check for the second day was made to Tetrault, but it is in a different amount than that of the first day and for a different number of bushels, and upon none of these conversations was Tetrault present to agree to or accept a division of the grain.

The agent testifies: "There was no attempt made to divide between Tetrault and Robertson any of the actual grain delivered; there was no grain divided in the elevator; both exhibits 1 and 2 were delivered by me to Dr. Robertson's father on the 26th of September, both at the same time; all of the grain was entered in Dr. Robertson's name in the scale book."

And again he was asked by plaintiff's attorney:

Q. And you say the grain was not divided?

A. No, sir.

And against he testified:

No, sir, the grain was not divided. I kept it all in one bin; some was put in on Saturday, and other people's grain with it, and we kept on putting in other people's grain in the same bin; so that on Monday I could not distinguish either Tetrault's grain that had been brought on Saturday from anybody else's grain.

This is the only positive evidence as to a division, and is clearly in favor of defendant's contention that no division was made. Plaintiff, upon the other hand, contends that the fact that there were two separate tickets of nearly the same size issued, one to Robertson and one to Tetrault, shows that there was a division, and points to the testimony of the agent, who says that "Robertson figured up as to the amount on

the ticket, exhibit 2, that was his part of it, and told him to draw the rest to Tetrault."

Q. At that time the grain had not all been received at the elevator?

A. No.

We do not see how this tends to establish a division. Surely no division could be had until all of the grain had been received in the elevator. Even if Robertson had consented that some of the money go to Tetrault, the inference would be that a division was delayed until all of the grain had been received, when a final settlement might be had. Nor do we think the conversations alleged by Herrmann to have occurred with Robertson tend in any manner to establish that a division had been made of the grain hauled from this farm to the elevator. Neither do we see anything in the letter written by the agent of the elevator company, November 20, 1911, of any tendency to show division. The letter reads in part as follows: "The first day's hauling of the grain was entered on scale book in Dr. Robertson's name, and was sold that evening on cash ticket No. 20,085 by orders from Robertson, and I held this ticket until the grain was all hauled in, which then was turned over to Robertson; here is a list of loads on that ticket. . . . This amount (Monday's hauling) is on cash ticket No. 20,090-1. This includes all the grain, and was no storage ticket made out at all. Was all sold by cash ticket when they got done hauling." See *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547; *Bidgood v. Monarch Elevator Co.* 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561, and valuable note at page 630 of the state report. Under the holding of this latter case, "a mortgage of personal property not then owned by the mortgagor will not attach to such property as a lien thereon until the mortgagor acquires some title or interest therein." And wherein it is further stated: "A mortgage was executed by a tenant upon a portion of a crop that he expected thereafter to raise, under a lease which declared that the entire title and right of possession of said crop should remain in the landlord . . . until the crop was divided. . . . The specific grain raised was never divided, but was delivered to an elevator for general storage, and subsequently the parties agreed upon their respective shares, and general storage checks were delivered by the elevator to each party for

the number of bushels to which he was entitled. Held, that the tenant never acquired any interest in the specific grain raised to which the mortgage lien could attach." See also *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304; *Wadsworth v. Owens*, 21 N. D. 255, 130 N. W. 932.

We are thus forced to the conclusion that in this case there was no evidence whatever of a division of the grain, and that therefore plaintiff's mortgage never attached thereto, and his suit must fall.

(3) The only remaining question for consideration is whether or not the statement made by the officers of the bank work an estoppel upon the elevator company, and prevent it asserting what we have already held to be the facts in this case. Two complete answers can be made to plaintiff's contention. First, the conversations relied upon by Mr. Herrmann are not binding upon the elevator company in this action, even though they might be binding if the bank were the defendant. And second, the conversations, even if given the most liberal construction, do not show any division of the grain which would, under the holding in the *Bidgood v. Monarch Elevator Co. Case*, supra, give life to plaintiff's chattel mortgage.

It thus follows that at the close of all the testimony, plaintiff had failed to establish any cause of action against the defendant, and the motion for a directed verdict should have been allowed.

The judgment of the trial court is reversed, and it is directed to allow the motion of defendant for a judgment notwithstanding the verdict which was made on the 9th day of April, 1912.

THE FIRST NATIONAL BANK OF SHELDON v. INGE-
BRIGHT E. ARNTSON, Karen W. Arntson, Anders M. Arntson,
and The Minneapolis Threshing Machine Company, a Corporation,
The Kratt Realty Company, a Corporation, D. C. Cullen, R. A.
Hinds and N. B. Hannum.

(145 N. W. 1056.)

**Transfer — fictitious — title — encumbrance — payment — judgment —
amount — taxes — decree of foreclosure.**

Plaintiff brings action to foreclose a second real estate mortgage for over

\$3,000. A, mortgagor and owner, defends, contending that by a deed executed to the Kratt Realty Company, a holding corporation for the plaintiff bank, plaintiff became owner of land covered by plaintiff's and other mortgages and liens aggregating over \$7,500, under an agreement whereby plaintiff assumed and agreed to pay all indebtedness secured by encumbrances against said land.

Held: Said transfer was a fictitious one procured to be made by A, and that neither plaintiff nor the Kratt Realty Company took title, nor agreed to pay any encumbrance on the land; and plaintiff is entitled to a judgment for an amount aggregating \$4,747.44 on March 1, 1914, with accruing interest from that date, and any payments made by plaintiff on the first mortgage lien, or any taxes paid by plaintiff to protect the mortgage foreclosed, together with costs of trial and appeal and a decree in foreclosure directed to be entered accordingly.

Opinion filed March 5, 1914.

Appeal from the District Court of Ransom County, *Allen, J.*

Reversed and judgment directed for plaintiff.

Pierce, Tenneson, & Cupler, for appellants.

There was no merger of the plaintiff's lien. *May v. Cummings*, 21 N. D. 281, 130 N. W. 827; 2 Pom. Eq. Jur. 3d ed. §§ 791-794; *Satterlund v. Beal*, 12 N. D. 125, 95 N. W. 518.

To destroy the effect of legal instruments affecting the title to real property by imposing an agreement resting in parol, the evidence must be clear, satisfactory, specific, and convincing. *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301.

The parol agreement, even if proved, would not prevent foreclosure. *Tronson v. Colby University*, 9 N. D. 563, 84 N. W. 474; 22 Cyc. 80, 87 & 103, note 52.

The bank was not a party to any such agreement. *May v. Cummings*, 21 N. D. 281, 130 N. W. 827.

Rourke & Kvello, for respondents Arntsons.

Appellant agreed to assume all encumbrance of record. The findings of the trial court are presumed to be correct. *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479; *James River Nat. Bank v. Weber*, 19 N. D. 702, 124 N. W. 952; *Ruettell v. Greenwich Ins. Co.* 16 N. D. 546, 113 N. W. 1029; *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257, 100 N. W. 717.

Lawrence & Murphy, for respondent Minneapolis Threshing Machine Company.

The question is whether or not the bank took the title to these mortgaged lands in satisfaction of the mortgage. *Tronson v. Colby University*, 9 N. D. 559, 84 N. W. 474.

Goss, J. This is a trial *de novo*. Plaintiff, the First National Bank of Sheldon, appeals from an adverse judgment, and seeks foreclosure of its mortgage on land in Ransom county once belonging to I. E. Arntson, mortgagor. Arntson had encumbered this land with a first mortgage of \$2,000, upon which \$575 principal had been paid, after which came the plaintiff's mortgage, amounting, with interest, to over \$3,000, past due, with a third mortgage past due for \$700, and interest to the Minneapolis Threshing Machine Company, after which came one or more judgments and mechanics' liens, running the aggregate debt against the farm to approximately \$7,500. The amount is not in dispute. The value of the land is variously fixed by the witnesses at from \$5,500 to \$9,500. At the time of trial the 1911 and 1912 taxes had not been paid. Whatever equity Arntson had left in the land was speculative, dependent upon conditions, sale, and purchaser. It is admitted that the mortgagor had, for a considerable length of time prior to April 17, 1912, the date of the occurrences under investigation in this suit, been attempting to rid himself of this indebtedness by finding some financially responsible party who would accept a deed to the land and assume the encumbrances against it. He had, some considerable time prior thereto, executed a written agreement with one Wilsie, a real estate agent, whereby Wilsie might sell the land for him to some person of financial responsibility, able to assume payment of such indebtedness, with the understanding that Wilsie might retain whatever he could get from the purchaser for the equity in the land over and above the indebtedness thereon. Wilsie had then procured the land to be deeded by Arntson to one Hines, a purchaser, in which deal Wilsie got a stock of groceries and crockery from Hines for his services, Hines assuming said encumbrances. Hines proved financially irresponsible and unable to take care of the past-due indebtedness, whereupon Arntson, contending that the delivery of the deed to Hines was obtained through misrepresentation, brought an action to set the same

aside, and filed a *lis pendens* against the land. Hines had gone into possession and leased the same to one Monroe for the crop season of 1912. Hines's deed from Arntson had not been placed of record, apparently because of unpaid delinquent taxes against the land that had to be paid prior to recording deed. The plaintiff had been obliged to pay two successive years' interest, amounting to \$171, and subsequent interest thereon, to protect its second mortgage from foreclosure of the first mortgage, and the interest on its own mortgage was a year and a half overdue, and it was about to foreclose for a sum in excess of \$3,000 and past-due interest on its mortgage and two years' unpaid taxes. Arntson had been county auditor of Ransom county for two years, and was worrying under the financial load he was carrying, as the land was yielding no returns, with the prospect that in spite of his pending action to cancel the deed given Hines, the latter would be in possession and crop the farm or obtain the proceeds therefrom for the coming season. The plaintiff, of course, had whatever advantage obtainable from foreclosure, and did not care to sit by and see its debt increase or the crop for the ensuing year go to others. Hines had an interest in the property to the amount of the stock of goods turned over to Wilsie, and refused to surrender his unrecorded deed. Under this condition of affairs the parties met on April 17, 1912, at the plaintiff's bank, which was also the office of the subsidiary Kratt Realty Company, whose managing officers were the cashier and president of the plaintiff bank, this company being the usual holding company with which to transact collateral real estate business then forbidden by the national banking law to be conducted by the bank. This meeting was under prearrangement between Arntson, Hines, and Wilsie. Arntson's purpose was to procure an extension of time on his indebtedness until fall, and to see if Hines could not be induced to part with his deed and accept in lieu thereof a written option to sell, that he might find a purchaser able to take care of the encumbrances and get reimbursement himself by a resale. Before negotiations had gotten far along, a difficulty arose between Arntson and Hines. Kratt, managing officer and president of the bank, interceded, and took Arntson into a back room, where considerable time was spent between them, formulating some arrangement that would adjust matters between the bank, Arntson, and Hines, and at the same time satisfy and safeguard their interests. On the exact terms of the deal

there made between these two men turns the decision of this lawsuit, as but matters of fact are involved. Arntson claims that the deal there made, and consummated later that day, was that the bank should purchase this land for the amount of outstanding encumbrances against it, to be assumed and paid by the bank, and, for the purpose of convenience, title was to be taken to the Kratt Realty Company, for and on behalf of the bank, with the mortgages and notes to be later returned to him as taken up by the bank. On the contrary, Kratt claims that Arntson made the proposition to him that as Arntson was unable to deal with Hines and recover the deed outstanding, but that as Hines was willing to accept a written contract from the bank, because it held the heavy encumbrance and could immediately foreclose, that the bank should take Arntson's deed to the premises to enable him to procure the surrender by Hines of his deed to the bank. In other words, that the transaction, although an apparent transfer to the bank or its holding company, was in reality for the purpose of procuring the outstanding deed to be surrendered, obviating the necessity of prosecution of the lawsuit against Hines, thereby securing Arntson the right to the crop for the season then opening, and giving Hines an opportunity to find a buyer able to pay up all the claims. Both contentions are plausible.

On emerging from the back room, Hines and Wilsie were given to understand by Kratt that either the bank or the Kratt Realty Company was behind the deal. A deed was then prepared from Arntson to the realty company, and given to Arntson, to be completed by his wife's signature and acknowledgment, subsequently procured, to be then returned for recording. There is no clause in the deed whereby the grantee assumed and agreed to pay any encumbrance. Contemporaneously the bank executed to Hines and Wilsie a listing agreement, wherein they were given until October 1st following the exclusive right to make a sale, and were to have all over and above the encumbrances as their commissions, the bank to furnish "clean, marketable title and abstract." The bank was to retain the current year's crops, "to be applied, first, on seed, and balance on indebtedness." The other important clause of the agreement reads: "The easiest terms I will sell on will be cash payment of interest on notes and mortgages on land from September 10, 1910, to date of sale; also an amount equal to principal

and interest of mortgage of \$700 to threshing machine company (to be paid us); balance one year's time. Purchase price to be an amount equal to total encumbrances and liens, with interest. Interest on deferred payments 12 per cent per annum to date of sale." The written lease of Hines with Monroe for a portion of the land was turned over to the bank, with the deed, some days later, after the auditor defendant had himself procured the recording of his own deed to the Kratt Realty Company, after he had made an indorsement thereon of taxes paid and transfer entered, which indorsement, he admits, was contrary to fact in that he has never, to the time of trial, paid the taxes for 1911, then delinquent. There is also a dispute as to whether he authorized the bank to advance the expenses for seed and cropping, something over \$600, during the season of 1912, he claiming that he had nothing more to do with it, and that the transfer was an absolute sale to the bank; while the plaintiff claims the same was not a sale, and that Arntson expressly authorized the bank to expend such money. The crop for the year reimbursed that expense and some \$46.15 besides. Kratt testifies that when he and Arntson were having their secret understanding, he told Arntson that he would not delay foreclosure, but that junior liens and encumbrances would be cut off, or redemption forced, inasmuch as the first and second mortgages would amount to as much as the land was worth before title could be gotten by foreclosure, he having no confidence in the ability of Hines and Wilsie to make a sale, and would not delay foreclosure. Arntson testifies there was to be no foreclosure. Within two weeks, foreclosure by advertisement was begun, which was enjoined by Arntson, whereupon plaintiff began this foreclosure by action, in which Arntson defends on the ground that plaintiff bank has title to and has assumed and agreed to pay all the encumbrances upon the land, and that plaintiff should not be permitted to defeat the liens of the junior encumbrancers by foreclosure, but instead should be compelled to pay them in full, and thereby relieve Arntson from all of his indebtedness so secured. The trial court in its findings found that plaintiff had in fact agreed to assume all such encumbrances.

We will now consider the evidence under the contentions of the parties. The testimony of Arntson is far from satisfactory. In many respects it is contradictory, and appears inconsistent with the rea-

sonable probabilities. In business, people usually act from mercenary motives, and men of business experience, as is the usual banker, do not needlessly involve themselves in liabilities where they have nothing to gain by so doing. The bank had the second lien, amounting to about \$4,000, past due, and was about to foreclose. It had favored Arntson by carrying him for eighteen or twenty months past due, and accumulated interest, besides payments made of first mortgage interest. The crop for the coming season it could obtain by sale on foreclosure of its land mortgage, and the matter would be put in position to ripen into title unless the junior encumbrancers would redeem from the foreclosure, which in such event would convert the claim into money. The issue here presented tends to establish the improbability of a redemption, as the real issue in this lawsuit is whether Arntson will pay his own debts, either personally or by a redemption by junior encumbrancers, or whether the bank, whose responsibility is beyond question, must pay them. The written instruments in evidence appear to favor plaintiff's case, from the fact that the deed contains no assumption of debt, which deed admittedly was prepared in the presence of the auditor, a man from whom we naturally must expect sufficient business ability to know the importance of the omission of such clause. This was prepared by Kratt, it is true, but it would seem that if the company was assuming these encumbrances the fact would be mentioned. It is disclosed in the testimony that Hinds and Wilsie were suspicious that this transfer was but a fake, from the fact that Hines refused to surrender up his deed to the bank until after the deed to the realty company should be placed of record, and this in spite of the fact that it was to the interest of Wilsie and Hines, as well as Arntson, that the deal should be found to be according to Arntson's version, as such a finding in effect consummated the very object of the former written agreement between Wilsie and Arntson by shifting all this indebtedness upon the bank, which thereby relieved Wilsie from ever accounting to Arntson for the stock of goods he had obtained through what is denominated by Arntson's own testimony as misrepresentation or deceit; while Hines was getting what he desired, a written assurance of the right to sell this property with terms of sale fixed, even though after foreclosure had. And in the land listing agreement is a clause that speaks strongly in plaintiff's behalf, reading: "Regarding the current year's crops

retained to be applied, first, on seed, and balance on indebtedness." If the realty company was actually buying this land for the amount of the then encumbrances upon it, it would seem somewhat inconsistent with reason that they would agree to apply the proceeds of the crop upon Arntson's indebtedness, as that is what this clause must refer to, inasmuch as it is not contended that either Hines or Wilsie owed the bank a cent. It is a strong circumstance in favor of the plaintiff that the written instrument, executed contemporaneously with the deed (under which it is contended that the indebtedness was shifted upon the bank and thereby canceled the notes and mortgages to be returned), should nevertheless stipulate such notes should remain unpaid for the purpose of applying the proceeds of some 200 acres of crop thereon to Arntson's benefit. And the effect of this clause is to cause doubt on the truth of Arntson's testimony, to the effect that nothing was said about the bank cropping the place or furnishing seed or paying expenses, because this clause provides for a reimbursement for such expense. If it be contended that the object of this provision was to secure a reduction of the amount that would have been paid by Hines and Wilsie had they affected a sale, the equivalent of giving them the portion of the crop as an incentive for making it, we are confronted with the question of how such a claim could be made when, under the theory of the respondents, the crop must belong to the bank, pursuant to the tenor of the whole deal and as further evidenced, as they claim, by the surrender to the bank of the written lease. Arntson cannot consistently contend a sale of the real estate to the bank and at the same time claim that the bank was to make a gift of half the crop raised the ensuing year to Wilsie and Hines. The only indebtedness that existed or that was in contemplation of the parties was Arntson's indebtedness, and the last instrument executed that day mentions his indebtedness, and provides for the application thereon of proceeds to be realized six months thereafter. This can, in no way, be harmonized to fit Arntson's claim, while, on the other hand, it is absolutely consistent with the plaintiff's case and testimony. Had \$10,000 worth of crop been raised that year, we venture Arntson would be calling attention to this provision were the claims of the parties reversed.

We place no significance in the fact that the bank carried an account for farming expense on its bank books under the heading of

"Farm Account." The bank had expended the money, and whether the charge was made on its books as against the farm or its realty company or Arntson would seem to be of little significance, excepting that naturally it would not be charged against its own subsidiary company. We place little importance on the testimony of Wilsie and Hines. Both are apparently interested in a recovery by Arntson. Besides, all their testimony may be taken as true and still no light be thrown therefrom on what the secret understanding was that was had between Arntson and Kratt in that back room.

Kratt was examined at length, both by counsel and the court, on the provision appearing in writing in the listing agreement, mentioning that the principal and interest of a \$700 note to the threshing machine company should be paid to the bank in case of sale. It provided that on sale all interest on the notes and mortgages on the land from September 10, 1910, to the date of sale, had to be paid. This evidently had reference to the first and second mortgages only, and was then followed with a stipulation that "an amount equal to principal and interest of \$700, to threshing machine company to be paid us; balance one year's time." This does not provide that the third mortgage of \$700 and interest should be paid or discharged, but instead that an amount equal to that mortgage and interest should be paid the bank. The reason seems plain. The bank had by this listing agreement bound itself to transfer title to Hines and Wilsie if they effected a resale. As a condition precedent thereto this contract provided that all back interest on the first and second mortgages was to be taken up. Its security in the land would then be that much better, and it could, on receiving the amount of the third mortgage, either apply that amount on its prior mortgage, and subsequently transfer subject to a liability to pay the machine company mortgage, or it could pay the mortgage of that company as it saw fit, in which latter case it might procure a discount from the company to inure to Arntson's benefit, as explained by Kratt's testimony. In either event the bank was not subjecting itself to a loss of security, nor, in the event of no sale being made, placing itself under obligation to pay the machine-company mortgage. There is some testimony that the subject of discounting this mortgage, if a sale was effected, was considered, and that Arntson would get any benefit of it. It may signify a willingness to keep the machine

company at a disadvantage in the collection of its debt, but if so, under Kratt's version, it would inure to the benefit of Arntson, whom Kratt at the time was helping out of the difficulty that his lack of business foresight had drifted him into. And from the fact that this paper was prepared at the same time as the deed from Arntson to the realty company, it would seem that any imputations against Kratt must apply with equal force to Arntson, the beneficiary acting with knowledge. We realize that on this point the testimony of the defense is that Arntson is in supposed ignorance of that part of the deal, and what was done between Kratt, Hines, and Wilsie, and had left the bank after the deed was drawn by which title was to be transferred to the realty company. But that smacks of the improbable.

We do not view Arntson's violation of the law as an official in making a false indorsement of taxes upon his own deed as strengthening his testimony. (Abs. pp. 65-67-79.) It may be urged that the fact that he was ridding himself of his obligations was a sufficient incentive for him to take chances on the consequences of thus getting the deed recorded. But if the bank was as anxious as he tries to make it appear, to knowingly assume \$7,500 worth of encumbrances for this land, one would reasonably expect a public officer of his standing to have had credit enough with that same bank to have borrowed a sum sufficient to pay one year's tax on this land, or to have been able to obtain it elsewhere. Besides, this tax was a lien the bank must have assumed under his own testimony, yet he never has contended but that he must pay this tax. His conduct and claims in this respect do not square with his defense. Anxiety to record the deed alone would seem to be more reasonably explained under the assumption that during the negotiations, and while Arntson was deceiving Hines, using the bank as an instrument to do so, to induce him to part with the deed, the subject-matter of a pending lawsuit (Abs. pp. 41-56-57-76-77-78), he also conceived the idea that might naturally arise in the mind of a so-called curb-stone lawyer, that because of the fact that the bank had taken this deed to its realty company, without any covenant concerning encumbrances, it had in law assumed them, and from this as a basis a claim that it had intentionally done so could be urged with force and plausibility, and could be easily supported by testimony amounting to mere conclusions. It is more probable that this deed was recorded in furtherance of such a precon-

ceived design, which would actually furnish a sufficient motive for the act, than that something else actuated it. Something of this kind was lurking in the mind of Arntson as a reason why he failed to pay any attention to the contents of the listing agreement, if his testimony to that effect is true, as he did not desire to know its contents, naturally surmising that the bank, acting under a belief that his indebtedness to it still continued, would provide therein for the application of the crop upon it or his repayment of cropping expenses; and the provisions that would probably be inserted, concerning the payment of Arntson's debts on this land in case of a resale, if made with his full knowledge, would make an attempted explanation in harmony with the theory here advanced by him, embarrassing to say the least. He attempts to avoid the force of all this by denying knowledge, in evasive testimony, of the contents of the listing agreement. (Abs. p. 76.)

Kratt has admitted that Arntson asked him, "What about these mortgages and notes; when will they be turned over to me?" And this is given much prominence by respondents on the theory that unless Arntson actually understood the deal was as he here claims it to be, why such a statement. In fact in this connection he was asked by examining counsel "if there wasn't some understanding or suggestion, why, in your opinion, would Arntson have asked you that question." To which he replied: "Because I don't think he understood it." From this answer it is also argued that Kratt was taking advantage of Arntson, and leading him into a deal that he did not understand, in order to perpetrate a fraud on him, which fraud, when reduced to its final analysis, amounts to nothing more than that Kratt would exercise his right of foreclosure immediately, and intended to do so all the time. The statement he admits making is not inconsistent with any discussion concerning the return of the mortgages and notes in case of sale under the listing contract. Or again, it is very probable that had Arntson the scheme in mind of forcing an assumption of this indebtedness, he would ask such a question, however groundless it might be in fact or contrary to the understanding had between the two in the back room. From Arntson's own testimony it was probably during the noon hour that he conceived the idea of putting the bank into the condition its subsequent acts that day placed it with reference to this land. He admits he went there with no idea of selling the land to the bank or to

the others, but that subsequently he "wanted to present the idea that he was selling the land to the Kratt Realty Company or to them, and so he asked Kratt if he wouldn't come into the back room, where he could see him privately." (Abs. p. 41) Arntson says he then made the proposition to Kratt to do what he claims resulted, the taking over of the land for the encumbrances against it. When Arntson saw the deed prepared to the Kratt Realty Company, and that Kratt had been induced to list the land back in the bank's name, it is not improbable that he saw the position into which Kratt had unwittingly placed himself in his desire to accommodate the man who had already obtained so much accommodation at his hands. To consummate this scheme all that was thereafter necessary, as Arntson believed, was to get this deed on record, which he did with all possible speed. Then he kept still, never demanding his notes and mortgages, even to the time of trial. Kratt first discerned Arntson's intentions two weeks later, when his foreclosure by advertisement was enjoined, when Kratt immediately offered to deed back the land to Arntson, which offer, of course, was refused. Kratt, then discovering the position he was in, had no alternative but to go ahead and crop this land, and make the best of a situation that on its surface appeared to be a purchase, and hope for a sale to be made by Hines to bring him in his money.

A careful study of the entire record, with the idea of trying to find some reasonable motive disclosed for the bank to have agreed to have assumed these encumbrances, results in failure. There is no way in which the bank could have defrauded Arntson out of a dollar under the written agreements. If this property had increased in value to \$15,000, for which amount a sale had been effected, the listing agreement would have rendered the overplus to Arntson as the sole possible beneficiary. The machine company in its brief says the bank was influenced by the opportunity to procure title to this property for the amount of the first and second mortgages, so that it could resell it for an advance of \$2,000 or more, should the opportunity afford during the summer. But this ignores the fact that the bank had, by written agreement, placed the proceeds of the sale where they must be applied, on the debt on the land, and all inure to Arntson's benefit, and that it could not itself have sold before October 1, 1912, without cleaning up encumbrances under the contract, even if it did foreclose at once. We

fail to see in the entire record where a motive is disclosed for plaintiff to deal underhandedly or dishonestly with Arntson, while, on the contrary, Arntson is interested in shifting his encumbrances upon the bank, thereby accomplishing what he attempted to do to others many months before ever he went to the bank this day in question. His allowing interest to default for years, as here done, plainly indicated he never intended to redeem from his indebtedness. His version is so palpably absurd from any standpoint, and so improbable from an analysis of his own testimony, as to be of little weight. His testimony as to what occurred between him and Kratt is conflicting, and does not appear to be straightforward and consistent. Besides, the proof is as strong of collusion between Arntson, Hines, and Wilsie to purposely place the bank in the position Arntson now contends for, as it is that Arntson is right and Kratt is wrong. Had these three men conspired to procure the bank to do as it has done, that Arntson might make the claim now advanced that the bank has assumed the indebtedness, and this without the bank agreeing to do so, they would have done exactly as they have done.

Hence we cannot agree in the findings of the trial court. We realize its superior advantages in arriving at the truth, and are reluctant to disturb its findings of fact, and would not do so if we did not feel constrained that its findings are not only unsupported by the preponderance of the evidence, but contrary to the great preponderance thereof, and inconsistent with and contrary to every reasonable probability we believe can be drawn from the testimony. Inasmuch as respondents have in their brief quoted and relied upon *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454, and similar authority, to the effect that before a court should set aside a deed the proof should be clear, convincing, and satisfactory that the deed does not evidence a bona fide transfer, it is probable that the decision of the lower court was made more upon a theory of failure of proof on the part of plaintiff to overcome the effect of the deed in evidence, than it was that all the evidence in the case did not preponderate in plaintiff's favor. But this case differs from the ordinary proof in action to set aside a deed in that contemporaneous with the deed in question between the parties interested, as a part of the same transaction to be construed with the covenants of the deed, is an equally binding written agreement contain-

ing matters wholly inconsistent with the theory that the deed was such in fact, and which, considered with all the other testimony in the case, does establish clearly and convincingly that the deed never was intended to be a conveyance, but an instrument evidencing only a part of the entire transaction. The deal taken as a whole did not amount to a conveyance of title as between Arntson and wife and the bank, or the realty company, but was merely a means to an end, the causing of the surrender of the outstanding deed without the necessity of prosecution of the lawsuit brought for its cancellation.

We find, therefore, that the mortgage sought to be foreclosed and owned by plaintiff is valid and unaffected by the deed in question, which deed should be set aside as invalid; that plaintiff should have judgment against defendant Arntson and his wife, Karen W. Arntson, for the full amount of which judgment is asked in the complaint, to wit, \$2,809.65, with 12 per cent interest from December 1, 1908, and \$85.50 and interest at 10 per cent from September 10, 1910, and \$85.50 and interest at 10 per cent from December 1, 1911, all amounting March 1, 1914, to \$4,799.66, less the sum of \$46.15 and interest thereon at 7 per cent annum since November 1, 1912, all amounting to \$52.22, leaving \$4,747.44 as the amount of principal and interest due plaintiff March 1, 1914, to which may be added any unpaid taxes and any payments subsequent to trial, made by plaintiff, of interest or principal of the first mortgage running to the Ransom County Immigration Association, and paid to protect the second mortgage here foreclosed, which amounts may be assessed by the trial court on plaintiff's application on ten days' notice to respondents' counsel, obviating necessity of service of notice of trial or placing of this case on the regular trial calendar, that collection by foreclosure may not be needlessly delayed; that plaintiff have foreclosure of the premises described in the complaint for the amount of such judgment, which judgment and foreclosure will include plaintiff's costs and disbursements on trial and on appeal.

Plaintiff is entitled to judgment against Anders M. Arntson to the amount of one half of the total judgment on foreclosure entered against I. E. Arntson and wife, and judgment against Anders M. Arntson will be entered accordingly. The pleadings and the proof establish that subsequent to these mortgages I. E. Arntson and wife conveyed a portion of the premises to Anders M. Arntson, the deed covenanting that the

grantee assumed and agreed to pay, as a portion of the consideration, one half of the mortgages to this plaintiff and the Ransom County Immigration Association. No general execution will issue against the property of Anders M. Arntson, however, until after a return made and filed of the proceedings had on foreclosure of the land mortgaged, to the end that said land may be first applied to the payment of the debt of the mortgagees and for which foreclosure is awarded. Any deficiency judgment remaining after foreclosure sale may be collected as provided by law by execution against the property of I. E. Arntson, K. W. Arntson, and Anders M. Arntson.

Judgment and decree of foreclosure ordered entered accordingly.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, v.
SHEYENNE TELEPHONE COMPANY, a Corporation.

(145 N. W. 1062.)

Plaintiff asks that the defendant telephone company be enjoined from removing its 'phones and discontinuing service in four railway depots of McVile, Pekin, Warwick, and Tolna, wherein telephones had been installed in 1909 under written contracts providing that, for the privilege of placing them in the depots, telephone service should be free to the railway company. The term of the McVile and Pekin contracts was for five years, with no right of cancellation to either party until after that time, when either could cancel on thirty days' notice. The contracts as to Warwick and Tolna provided that the telephone company should furnish free service for as long as it should maintain an exchange in those towns, and stipulated against the right of cancellation of the contract or the removal of the 'phones by the telephone company; while the railway company reserved the right to at any time, on thirty days' notice, order the 'phones out and service discontinued. Chapter 252, Session Laws of 1911, requires railway companies to install and maintain telephone service in their depots for the benefit of their patrons, with fine to be imposed for noncompliance, after the enactment of which the telephone company notified the railway company that free telephone service would be furnished it no longer, and that the contracts would be considered terminated, and attempted to remove its 'phones and discontinue service to the depots, when the railway company began this action and the telephone company was enjoined from so doing, and on trial the action was dismissed and the contracts held unenforceable. From this judgment the railway company, plaintiff, appeals. *Held:—*

Telephone service — railway depots — contracts — mutual — obligation — termination — perpetual — inequitable contract — court of equity — specific performance.

1. The contracts as to Warwick and Tolna are not mutual in obligation, being subject to termination at the will of one of the parties, with a stipulation that no corresponding right shall be exercised by the other party; that the lifetime of the contracts may be practically perpetual or for so long a term as to render the mere license or privilege of installing the 'phones wholly inadequate as a consideration for the contract, though the same was voluntarily and understandingly entered into; that such want of mutuality, inadequacy of consideration, and length of term, considered together, render the contracts so inequitable that a court of equity will not enforce specific performance of them, but treat the same as invalid and nonenforceable.

Contract — definite — cancelation — right of — valid.

2. The five-year contracts as to McVile and Pekin are definite in consideration and lifetime, with no right of cancelation reserved to either party, and were entered into understandingly, and are not inequitable, and are valid and enforceable.

Contract — specific performance — wanting in mutuality — equity — actions at law.

3. That specific performance of contracts wanting in mutuality of obligation may be enforced in equity, as mutuality of contract, standing alone, may be insufficient to render a contract otherwise equitable nonenforceable and invalid in equity, a different rule being recognized in equity from that in actions at law as to want of mutuality.

Contract — specific performance — negative covenants — restrain breach of — injunction — telephone company — 'phone in depots.

4. While a court of equity will not decree specific performance of a nonmutual contract by compelling performance of it according to its terms, it will indirectly effect the same result, where possible, by merely restraining a breach of its negative covenants, as here illustrated, by enjoining the telephone company from discontinuing service and removal of its 'phone from the depots in this instance at McVile and Pekin.

Enjoining breach of negative covenants — not specific performance — equitable relief.

5. Enjoining the breach of negative covenants is not, strictly speaking, however, specific performance of the contract, but merely the granting of equitable relief awarded on the general equities of the case.

Obligation — personal service — specific performance.

6. Section 6614, Rev. Codes 1905, providing that an obligation to render personal service or to employ another in personal service cannot be specifically enforced, is not involved in this case.

Telephone company — duty — general public — arbitrary refusal to install — conditions.

7. Under the claim of the telephone company, that although equity would otherwise recognize the contract as enforceable it should not entertain this action because the telephone company has an adequate and specific remedy at law in an action for damages for breach of the contract, it is *held*:—

Rights — general public — invasion of — telephones — rental price — relief — equity — contract — enforced in equity by injunction — cancelation of contract — notice of — costs — disbursements.

(a) A duty rests upon the telephone company to furnish its services to the plaintiff as a member of the general public, and it cannot arbitrarily refuse to install a telephone in plaintiff's place of business so long as no conditions different from those generally given are required, and so long as such services are paid for, any more than plaintiff common carrier can discriminate against individuals, and say who it will carry and who it will not carry.

(b) The invasion or deprivation of this right of plaintiff to enjoy, with the general public, the use of a telephone and connections, which right will be violated by breach of this agreement, is not measureable by the mere rental price of the telephone instrument, and equity will not permit such right to be denied plaintiff while granted to all others in that vicinity; and an action at law is inadequate to afford relief for violation of such right, and equity will enjoin its violation.

(c) The telephone company was properly enjoined from removing the instruments and discontinuing the service pending the determination of its right to charge defendant for such service.

(d) A contract made by a public-service corporation with a patron or consumer, wherein it is to furnish service, will be enforced in equity by enjoining it from discontinuing its service or removing its property from the premises of the patron or consumer, instanced here by the enjoining of the telephone company from removing its instruments from the depots at McVile and Pekin.

Telephones — contract for free service to railway.

8. Plaintiff is held liable under its contracts at Tolna and Warwick stations for telephone service, chargeable from the date of notice of cancelation of such contracts to the date of the judgment entered in this case on this order.

Costs — where neither party prevails.

9. Neither party prevailing as to all contentions made, but each recovering equal relief, costs to either is denied, and no costs or disbursements will be taxed, each party to pay its own costs and disbursements.

Opinion filed March 6, 1914.

From a judgment of the District Court of Nelson County, *Templeton, J.*, plaintiff appeals.

Modified.

Murphy & Duggan, for appellant.

Voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to have been known to the person accepting. Rev. Codes 1905, § 5310.

The consideration at the time the contract was made, was reasonable and fair. This is the test as to adequacy of consideration. *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Cox v. Burgess*, 139 Ky. 699, 96 S. W. 577; *Lee v. Kirby*, 104 Mass. 420; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900.

One cannot be released where contract is fairly and freely made. *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778.

Mere inadequacy of consideration in a contract is no defense to its specific performance. 6 Am. & Eng. Enc. Law, 696; *Ullsperger v. Meyer*, 217 Ill. 262, 2 L.R.A.(N.S.) 221, 75 N. E. 482, 3 Ann. Cas. 1032; *Marks v. Gates*, 12 Ann. Cas. 123, note.

The rule is that specific performance of an obligation may be compelled. N. D. Codes 1905, art. 7, § 6609; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.

The good will of a business is an adequate consideration for a contract, and equity will grant relief, by accounting, for its violation. *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713.

The contracts here in question are mutual. The option in one party to terminate the contract forms a part of the contract, and is legal and enforceable. *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; *Singer Sewing-Mach. Co. v. Union Button-Hole & Embroidery Co.* Holmes, 253, Fed. Cas. No. 12,904.

There is no reason why a contract fairly entered into should not be specifically performed and enforced, if each party can be given what it contracted to have. *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 8 L.R.A.(N.S.) 433, 124 Am. St. Rep. 384, 97 S. W. 772; *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446, 14 So. 672;

Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015; Allen v. New Domain Oil & Gas Co. 24 Ky. L. Rep. 2169, 73 S. W. 747; Cooper v. Lansing Wheel Co. 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 39; Robson v. Mississippi River Logging Co. 61 Fed. 893.

Defendant, having assumed and enjoyed the benefits of the contract, is likewise bound by its obligations. 7 Am. & Eng. Enc. Law, 767, and note 1.

It is immaterial that the defendant is a corporation. It is bound in the same manner as an individual. Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047; Dedrick v. Ormsby Land & Mortg. Co. 12 S. D. 59, 80 N. W. 153; Huron Printing & Bindery Co. v. Kittleson, 4 S. D. 520, 57 N. W. 233; Hunt v. Northwestern Mortg. Trust Co. 16 S. D. 241, 92 N. W. 23.

Equity will enforce such a contract. 22 Cyc. 848 et seq.; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; Gallagher v. Equitable Gaslight Co. 141 Cal. 699, 75 Pac. 329; Xenia Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 147; Simpson v. Pittsburgh Plate Glass Co. 28 Ind. App. 343, 62 N. E. 753; Graves v. Key City Gas Co. 83 Iowa, 714, 50 N. W. 283; Sewickley Borough School Dist. v. Ohio Valley Gas Co. 154 Pa. 538, 25 Atl. 868; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 600, 41 L. ed. 265, 278, 16 Sup. Ct. Rep. 1173.

Goss, J. Plaintiff seeks equitable relief to restrain removal of telephones from its depots at McVille, Pekin, Tolna, and Warwick. From judgment of dismissal plaintiff appeals. Facts are undisputed; issues are of law only.

The telephone company maintains an exchange in each of the four towns, and has been affording telephone service to the depots in the villages of McVille and Pekin since the year 1909, and of Tolna and Warwick since September and October, 1907. The 'phones were installed under written contracts, providing that the consideration for their installation, maintenance, and service by the telephone company should be the permission or license to install for the public convenience and that of the railroad company, granted by that company to the telephone company. The McVille and Pekin contracts stipulate that "this

agreement shall continue in effect for the term of five years from the date hereof, and thereafter until thirty (30) days' notice shall be given by either party to the other." They expire in 1914 if terminated by notice. No right is reserved in either party to earlier cancel them. The contracts as to Tolna and Warwick were altogether different. The consideration moving from the railroad company to the telephone company was the same, being merely the permission to install the 'phones in the depots and incidental benefits accruing to the telephone company and its patrons therefrom. It was terminable by the railroad company at its option on thirty days' written notice, but with no corresponding right of cancellation reserved to the telephone company. The contracts stipulate against cancellation by the telephone company, and provide that the telephones should remain in the depots, and that service thereon should be given the railroad company, free of any charge whatever for service, maintenance, or telephone connections, "so long as the party of the second part shall maintain a telephone exchange at said town." In brief, the McVille and Pekin contracts were not subject to cancellation by either party until after five years from date, when either could terminate. Service and 'phone connections were to be furnished free for five years, and had been, under the contract, paid for in advance by the privilege granted of installing the 'phones in the depots. As to Warwick and Tolna the contracts, as to the telephone company, were to be practically perpetual and without charge, and drawn on the theory that the license to install the telephones in said depots paid for services to be rendered by the telephone company without charge for as long a period as that company maintained its exchange in the village.

The telephones had been installed under said agreements, and no charge for telephone service had ever been made against the railroad company until a short time before the commencement of this action, when the railroad company was notified that the 'phones would be removed unless it paid the 'phone rental and charge for services as exacted of all other telephone patrons. This the railroad company refused to pay, whereupon the telephone company disconnected the depot 'phone and admittedly was about to remove its instruments from the depots when enjoined, whereupon the 'phones were again connected and service continued pending the outcome of this action. The present

conduct of the 'phone company may have been induced by chapter 252 of the Session Laws of 1911, requiring railroad companies, under penalty of a fine of not less than \$100, and not more than \$200 per day during any period of violation of the act, to "provide, furnish, and maintain in all of their freight and ticket offices in all towns, cities, and villages in this state, where there is a local telephone exchange, and where such service is available, reasonable and adequate telephone connections for the use and benefit of its patrons." Knowing that the railroad company was thus obliged to maintain these 'phones, the telephone company refused to longer furnish it free service, even though it had contracted to do so. Appellant contends that as the contracts were voluntarily entered into for a then satisfactory consideration, and partially performed, and the benefits enjoyed by both parties for several years, they are enforceable and the breaching of them should be enjoined. Respondent asserts all of them to be unenforceable for want of mutuality of contract and remedy; that the contracts are so inequitable that they should neither be enforced nor their breach enjoined; that they stipulate for the rendition of personal service, the specific performance of which cannot, under § 6614, Rev. Codes 1905, be enforced; and that plaintiff has no standing in equity, it having full and adequate relief in law by an action for damages for breach of contract.

It is plain that the two contracts are radically different from a legal standpoint. The five-year contracts for McVille and Pekin stations are in all respects mutual and binding according to their terms, unless otherwise so inequitable that equity will not enforce them nor enjoin their breach. They are mutual as given upon a consideration, since substantially performed with the contract terms fixed, with neither party having the right to terminate at its pleasure until after the expiration of the five-year period. As to adequacy of consideration, the term of the contract has an important bearing thereon, and where the contract is mutual equity will not, other than in exceptional cases, relieve from the contract obligations merely because of what may seem to be an inadequate consideration. *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; *Rausch v. Hanson*, 26 S. D. 273, 128 N. W. 611.

The Tolna and Warwick contracts present an entirely different aspect. These are not mutual in obligation, having at all times been

terminable on thirty days' notice by the railroad company. But want of mutuality alone is regarded differently in equity from actions at law. In equity want of mutuality of contract is not all-controlling. *Singer Sewing-Mach. Co. v. Union Button-Hole & Embroidery Co.* Holmes, 255, Fed. Cas. No. 12,904. As declared in *Pomeroy's Equity Jurisprudence*, vol. 6, § 769, the rule that a contract to be enforceable must be mutual at the time it was entered into, controlling in law actions, is in equity "open to so many exceptions that it is of little value as a rule." In law actions mutuality is determined as of the time the contract is entered into. In equity the question is considered as of the time of the filing of the bill for equitable relief, as is illustrated by specific performance of the ordinary option contract, which to be an option must be unilateral, and the filing of the bill to enforce the same being considered its irrevocable acceptance. *Pom. Eq. Jur.* § 773.

But plaintiff is seeking specific performance indirectly by enjoining a breach of contract. The granting of such relief is within equitable cognizance, to be exercised, however, as a legal, and not arbitrary, discretion. *Ullsperger v. Meyer*, 217 Ill. 262, 272, 2 L.R.A. (N.S.) 221, 75 N. E. 482, 3 Ann. Cas. 1032; *Miller v. Tjexhus*, 20 S. D. 12, 104 N. W. 519. And the contract, the violation of which is to be restrained, must be so far equal and just in its terms and circumstances as to be enforceable in equity and good conscience. *Pom. Eq. Jur.* § 785. *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900. And it must not operate harshly or be inequitable, or equitable relief be denied. *Easton v. Lockhart*, 10 N. D. 181, 193, 86 N. W. 697. "Although mere inadequacy of consideration standing alone will not prevent a court of equity from enforcing a contract, it is an ingredient which, associated with others, will contribute to prevent the interference of a court of equity. *Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120. The court may examine into the consideration of the contract, its fairness and equity and all the circumstances connected with it, and if anything inequitable appears it will not be enforced. *Rodman v. Zilley*, 1 N. J. Eq. 320." Quoting from the note to *Marks v. Gates*, 12 Ann. Cas. 120-124. *Kaster v. Mason*, 13 N. D. 107, 99 N. W. 1083. *Marks v. Gates* is also in point, and a strong authority for respondent's contention. The want of mutuality, inadequacy of consideration, and the term of the contract stipulating as it does for gratuitous service for

perhaps a hundred years to be rendered by defendant to plaintiff for the mere privilege, license, or permission granted to install its instruments, taken as a whole, demand our refusal to assist in enforcing such an agreement. The contract in effect amounts to but an offer to defendant that if it will forever furnish free telephone service to plaintiff, defendant may install and keep in order for all time its telephones in plaintiff's place of business. A search of the books fails to disclose where equity ever enforced so inequitable a contract. It should not do so indirectly by enjoining its breach. *Marks v. Gates*, and the note thereto, cites abundant authority for our denial of relief to plaintiff as to the two contracts under which these 'phones were installed in the Tolna and Warwick depots. *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Newman v. Freitas*, 129 Cal. 283, 50 L.R.A. 548, 61 Pac. 907. As to these two stations the telephone company, after notice of cancellation given, is under no obligation to furnish 'phones and service without the usual compensation therefor being paid.

Our holding that the McVile and Pekin contracts are enforceable and valid necessitates consideration of respondent's assertion of want of power in a court of equity to afford relief by decreeing specific performance; and also that the contract calls for the rendition of personal service under § 6614, Rev. Codes 1905; and, further, that even though otherwise cognizable in equity, relief should be denied on grounds that the railroad company may have full and adequate relief in an action at law.

† Specific performance is not being decreed, and hence the authorities cited by respondent, illustrated by holdings refusing to compel specific performance of building and similar contracts, are not in point. We may assume that the court is without power to compel respondent to furnish telephone service to this company any longer than it, as a public service corporation in the exercise of its franchise, furnishes telephone service to the general public. The courts of equity enforce the observance of such contracts as this by restraining a breach of contract. This is indirectly compelling specific performance by restraining a defendant from violating negative covenants. Here the telephone company has agreed to, "at its own cost and expense, install and maintain said telephone instrument in said depot. . . ." And that "it will, without charge therefor, furnish the party of the first part, its agents

and employees, full telephone service in connection with its exchange at (McVille and Pekin), it being the intent hereof that the party of the first part shall be at no expense whatever, either by way of rental or otherwise, on account of the installation and maintenance of said telephone instrument, or the enjoyment of the telephone service in connection therewith." This portion of the contract defendant threatens to breach. *Singer Sewing-Mach. Co. v. Union Button-Hole & E. Co.* Holmes, 253, Fed. Cas. No. 12,908, answers respondent's contention as does the following from *Metropolitan Exhibition Co. v. Ewing*, from the United States circuit court of the district of New York, 7 L.R.A. 381, 42 Fed. 198: "The doctrine is now generally recognized that while a court of equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, like that involved in the present case [a baseball contract with player reserve clause], it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise, and this power will be exercised whenever the contract is one of which the court would direct specific performance if it could practically compel its observance by the party refusing to perform through a decree for specific performance. It is indispensable, where the contract does not relate to realty, that it be one for the breach of which damages would not afford an adequate compensation to the plaintiff. It must be one in which the plaintiff comes into court with clean hands, and which is not so oppressive as to render it unjust to the defendant to enforce it. It must be one in which there are mutual promises, or which is founded on a sufficient consideration. It must be one the terms of which are certain, and in respect to which the minds of the parties have distinctly met so that there can be no misunderstanding of their rights and obligations." To the same effect see *Cort v. Lassard*, 6 L.R.A. 653 and note (18 Or. 221, 17 Am. St. Rep. 726, 22 Pac. 1054); *Singer Sewing-Mach. Co. v. Union Button-Hole & E. Co.* supra; and *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973, where such negative relief is granted in the following summary of the court's holding: "Substantial justice between the parties requires that the court should restrain the defendant from playing with any other club during his contract with the plaintiff;" and this even though the court could not, because of the contract being one to render personal service as exempted under our statute, § 6614,

Rev. Codes 1905, but declaratory of the common law, compel specific performance of the particular contract by compelling the player to actually perform the same. The last two cases are similar instances where the court lacked the power to decree specific performance, but yet possesses the right used to prevent the player from selling his services to others when they belonged under his contract to the complainant. We can then assume that the performance by this telephone company of its part of the agreement will be the rendition of personal service under § 6614, Rev. Codes 1905 (which, however, is contrary to fact, as that section is meant to cover the rendition of personal service instanced by the service rendered by musicians, actors, writers, baseball players, and the like, and having no relation to service afforded the public by public service corporations), yet the statute does not constitute a defense to an action in equity to restrain breach of negative contract covenants.

Respondent claims relief should be denied, asserting plaintiff to have an adequate remedy at law. In this respondent is in error. It overlooks the duty imposed by law upon it to furnish its services to any of the public demanding and willing to pay for them and within its ability to furnish as public service. It cannot arbitrarily refuse to install a telephone in plaintiff's place of business so long as no conditions peculiar or different from those generally given are required, and so long as such services are paid for, any more than plaintiff common carrier can discriminate against individuals, and say who it will carry and who it will not carry. A duty rests upon the telephone company analogous to those under which gas and light companies and common carriers deliver and sell their services to the public. It is the deprivation of this right in plaintiff to have and enjoy with the general public the use of a telephone and connections at this exchange that will be violated by a breach of this agreement, and which right is not measured by the mere rental price of the telephone instrument. This right equity will not permit to be arbitrarily denied plaintiff while granted to all others in that vicinity. This illegal deprivation of a right in all respects identical with the denial of a right to gas or light of such similar public service corporations, equity will enjoin, as an action at law can afford the patron no adequate relief. *Sickles v. Manhattan Gaslight Co.* 64 How. Pr. 33. A dispute as to obligation to pay for service as here present is no ground for arbitrary and unreasonable action by respond-

ent. "When a dispute arises between the company and a consumer, the latter is entitled to have his rights investigated by the courts." In such a case "an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried." *Gallagher v. Equitable Gaslight Co.* 141 Cal. 699, 75 Pac. 329, to the same effect, is a case on all fours with the one at bar, the court by injunction "restraining the gas company from discontinuing the furnishing of gas," and by indirection compelling it to observe the obligation of its contract with the consumer. *Mackin v. Portland Gas Co.* 38 Or. 120, 49 L.R.A. 596, 61 Pac. 134, 62 Pac. 20; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 14 L.R.A. 669, and note (3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 516); *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; and 22 Cyc. 850, with notes. Injunctive relief went much further than here given in a very similar case of *People's Natural Gas Co. v. American Natural Gas Co.* 233 Pa. 569, 82 Atl. 935, where that court says: "It is no longer a debatable question in Pennsylvania that an injunction is the proper remedy to prevent breach of a contract made by a natural gas company with a consumer by enjoining it from shutting off the gas."

Aside from these considerations the breach of this agreement would involve a multiplicity of suits to recover rental wrongfully extorted, granting that the same could be recovered when once paid. 22 Cyc. 766.

There is yet another reason for granting relief. Assuming chapter 252 of the Session Laws of 1911 to be valid, the company might be subject to criminal prosecution and resulting damages should it permit the 'phones to be removed from its depots, because of the sole reason that it did not care to pay the rental therefor pending determination of its rights under its contract with the defendant.

Our holding summarized is that two of these contracts are invalid, and equity will not interfere with defendant when it refuses to longer perform thereunder; the two contracts of the five-year term are mutual in obligation, and are not so inequitable and inadequate in consideration under the circumstances of this case but that equity will enjoin their violation to the extent herein before set forth; that to do so is not in excess of the equitable powers of the court; that plaintiff has no adequate remedy at law; and that the injunction as prayed for should issue subject to modification should a change in the status of the parties

in equity require it. As each party equally prevails on this appeal, neither will recover costs of the other in this court or on trial below. The trial court will enter decree accordingly, affirming its judgment of dismissal as to Warwick and Tolna stations, but vacating its dismissal of this suit as to the stations of McVille and Pekin, as to which two stations injunctive relief will be granted restraining removal of telephones or discontinuance of telephone service to the depots until after expiration of the telephone contracts in 1914, during which time no charge therefor shall be recoverable. Plaintiff is liable under its contracts at Tolna and Warwick stations for charge for telephone service from the date of notice of cancellation of such contracts by defendant to date of judgment entered on this order.

Decree will be entered accordingly.

OLE HAUGO v. GREAT NORTHERN RAILWAY COMPANY.

(145 N. W. 1053.)

Contributory negligence — as matter of law — facts and circumstances — no other inference — recovery.

In order to constitute contributory negligence as a matter of law, the facts and circumstances must be such that no other inference can fairly and reasonably be drawn therefrom. Evidence examined, and *held* that plaintiff was guilty of such negligence in the case at bar that he cannot recover.

Opinion filed March 6, 1914.

Appeal from the District Court of Bottineau County, *Burr, J.*
Reversed.

Murphy & Duggan, for appellant.

The plaintiff was guilty of such contributory negligence as will preclude a recovery by him, and the court erred in denying defendant's motion for a directed verdict. *West v. Northern P. R. Co.* 13 N. D.

Note.—On the question what is and what is not contributory negligence, see notes in 32 Am. Rep. 98 and 8 Am. St. Rep. 849. And for the general principles of law applicable to contributory negligence, see note in 55 Am. Dec. 666.

221, 100 N. W. 254; *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 24 N. D. 40, 138 N. W. 976; *Pendroy v. Great Northern R. Co.* 17 N. D. 445, 117 N. W. 531; *Hope v. Great Northern R. Co.* 19 N. D. 438, 122 N. W. 997.

Where physical evidence conclusively establishes that if plaintiff *had looked* for the train after he had passed the obstruction he could have seen it, the plaintiff cannot make an issue of fact by stating that he *looked* but did *not see* the train. He *could* have seen it. *Powers v. Iowa C. R. Co.* — Iowa, —, 136 N. W. 1049; *Bloomfield v. Burlington & W. R. Co.* 74 Iowa, 607, 38 N. W. 431; *St. Louis, I. M. & S. R. Co. v. Coleman*, 97 Ark. 438, 135 S. W. 338; *Wilson v. Illinois C. R. Co.* 150 Iowa, 33, 34 L.R.A.(N.S.) 687, 129 N. W. 340; *Gehring v. Atlantic City R. Co.* 75 N. J. L. 490, 14 L.R.A.(N.S.) 312, 68 Atl. 61; *Schwartz v. Mineral Range R. Co.* 153 Mich. 40, 17 L.R.A.(N.S.) 1253, 116 N. W. 540; *Knox v. Philadelphia & R. R. Co.* 202 Pa. 504, 52 Atl. 90; *Wickham v. Chicago & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982, 1 Am. Neg. Rep. 198; *Schmidt v. Missouri P. R. Co.* 191 Mo. 215, 3 L.R.A.(N.S.) 196, 90 S. W. 136; *Davis v. Chicago, R. I. & P. R. Co.* 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; *Cowen v. Dietrick*, 101 Md. 46, 60 Atl. 282, 4 Ann. Cas. 292; *White v. Minneapolis, St. P. & S. Ste. M. R. Co.* 147 Wis. 141, 133 N. W. 148; *Marshall v. Green Bay & W. R. Co.* 125 Wis. 96, 103 N. W. 249; *Pittsburg, C. C. & St. L. R. Co. v. West*, 34 Ind. App. 95, 69 N. E. 1017; *Blumenthal v. Boston & M. R. Co.* 97 Me. 255, 54 Atl. 747; *Peters v. Southern R. Co.* 135 Ala. 533, 33 So. 332; *Carlson v. Chicago & N. W. R. Co.* 96 Minn. 504, 4 L.R.A.(N.S.) 349, 113 Am. St. Rep. 655, 105 N. W. 555; *Kemp v. Northern P. R. Co.* 89 Minn. 139, 94 N. W. 439; *Kelsay v. Missouri P. R. Co.* 129 Mo. 362, 30 S. W. 339; *Lane v. Missouri P. R. Co.* 132 Mo. 4, 33 S. W. 645, 1128; *Waggoner v. Chicago, B. & Q. R. Co.* 152 Mo. App. 173, 133 S. W. 68; *Meehan v. Great Northern R. Co.* 43 Mont. 72, 114 Pac. 781, 3 N. C. C. A. 556.

The master is not under legal obligation to supervise the details of the work, and is not bound at his peril to inspect tools, etc., defects in which would be just as apparent to the ordinary workman, as they would to him. *Koschman v. Ash*, 98 Minn. 312, 116 Am. St. Rep. 373, 108 N. W. 514, and cases cited; *Brown v. Swift & Co.* 91 Neb. 532, 136 N.

W. 726; Vanderpool v. Partridge, 79 Neb. 165, 15 L.R.A.(N.S.) 668, 112 N. W. 318; Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497; Longpre v. Big Blackfoot Mill. Co. 38 Mont. 99, 99 Pac. 131; Lukovski v. Michigan C. R. Co. 164 Mich. 361, 129 N. W. 707; Olson v. Doherty Lumber Co. 102 Wis. 264, 78 N. W. 572; Hathaway v. Illinois C. R. Co. 92 Iowa, 337, 60 N. W. 651.

The defendant was not negligent. Lake Shore & M. S. R. Co. v. Barnes, 166 Ind. 7, 3 L.R.A.(N.S.) 781, 76 N. E. 629; Sutton v. Chicago, St. P. M. & O. R. Co. 98 Wis. 157, 73 N. W. 993; Missouri P. R. Co. v. Hansen, 48 Neb. 232, 66 N. W. 1105; Newhard v. Pennsylvania R. Co. 153 Pa. 417, 19 L.R.A. 563, 26 Atl. 105; Knox v. Philadelphia & R. R. Co. 202 Pa. 504, 52 Atl. 90; Atchison, T. & S. F. R. Co. v. Judah, 65 Kan. 474, 70 Pac. 346, 12 Am. Neg. Rep. 601; Reading & C. R. Co. v. Ritchie, 102 Pa. 425; Missouri P. R. Co. v. Moffatt, 56 Kan. 667, 44 Pac. 607, 11 Am. Neg. Cas. 554; Goodwin v. Chicago, R. I. & P. R. Co. 75 Mo. 73; Miller v. Chicago & N. W. R. Co. 21 S. D. 242, 111 N. W. 553; Galveston, H. & S. A. R. Co. v. Wink, — Tex. Civ. App. —, 31 S. W. 326; Muster v. Chicago, M. & St. P. R. Co. 61 Wis. 325, 50 Am. Rep. 141, 21 N. W. 223; Tobias v. Michigan C. R. Co. 103 Mich. 330, 61 N. W. 514; New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130, 12 Am. Neg. Rep. 343; Atchison, T. & S. F. R. Co. v. Hague, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; Childs v. Pennsylvania R. Co. 150 Pa. 73, 24 Atl. 341; Partlow v. Illinois C. R. Co. 150 Ill. 321, 37 N. E. 663, 51 Ill. App. 597; Pepper v. Southern P. R. Co. 105 Cal. 389, 38 Pac. 974, 11 Am. Neg. Cas. 200.

It is held that failure to hear signals is not contradictory of clear evidence that the signals were given. Payne v. Chicago & N. W. R. Co. 108 Iowa, 188, 78 N. W. 813; Anspach v. Philadelphia & R. R. Co. 225 Pa. 528, 28 L.R.A.(N.S.) 382, 72 Atl. 373; Newhard v. Pennsylvania R. Co. 153 Pa. 417, 19 L.R.A. 563, 26 Atl. 105; Keiser v. Lehigh Valley R. Co. 212 Pa. 409, 108 Am. St. Rep. 872, 61 Atl. 903; Knox v. Philadelphia & R. R. Co. 202 Pa. 504, 52 Atl. 90; Wickham v. Chicago & N. W. R. Co. 95 Wis. 23, 69 N. W. 982; Bohan v. Milwaukee, L. S. & W. R. Co. 61 Wis. 391, 21 N. W. 241; Howe v. Northern R. Co. 78 N. J. L. 683, 76 Atl. 979; Stuart v. Nashville, C. & St. L. R. Co. 146

Ky. 127, 142 S. W. 232; St. Louis, I. M. & S. R. Co. v. Coleman, 97 Ark. 438, 135 S. W. 338; Baltimore & O. R. Co. v. State, 96 Md. 67, 53 Atl. 672; Cathcart v. Hannibal & St. J. R. Co. 19 Mo. App. 113; Sutton v. Chicago, St. P. M. & O. R. Co. 98 Wis. 157, 73 N. W. 993; Evison v. Chicago, St. P. M. & O. R. Co. 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6; Powers v. Iowa C. R. Co. — Iowa, —, 136 N. W. 1049; Bloomfield v. Burlington & W. R. Co. 74 Iowa, 607, 38 N. W. 431.

In any event, a failure to give this signal could not in anywise have caused the accident. Mankey v. Chicago, M. & St. P. R. Co. 14 S. D. 468, 85 N. W. 1013.

It was the duty of plaintiff to look and listen, before approaching the main track to a point of danger, and if by looking and listening he could have known the train was approaching, *then* it was negligence for him to drive upon the track without doing so, and he cannot recover. Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; West v. Northern P. R. Co. 13 N. D. 221, 100 N. W. 254; Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 976; Payne v. Chicago & N. W. R. Co. 108 Iowa, 188, 78 N. W. 813, and cases cited.

The train has the right of way, and the train men may presume that travelers are exercising care and prudence, when they have no notice that travelers are careless or ignorant of the approach of the train. Horan v. Boston & M. R. Co. 106 C. C. A. 535, 184 Fed. 453; Wasmer v. Missouri P. R. Co. 166 Mo. App. 215, 148 S. W. 155; St. Louis & S. F. R. Co. v. Summers, 97 C. C. A. 328, 173 Fed. 358; Morton v. Southern R. Co. 112 Va. 398, 71 S. E. 561.

Weeks & Moum, for respondents.

Where the evidence produced presents an issue of fact, which if determined in plaintiff's favor would entitle him to recover, the case should be submitted to the jury. Where there is some evidence, although *slight*, the case should be so submitted. The judge has *nothing* to do with the *weight* of the testimony. 31 Cyc. 1532; Bickery v. Burton, 6 N. D. 245, 69 N. W. 193; McRea v. Hillsboro Nat. Bank, 6 N. D. 353, 70 N. W. 813; Pirie v. Gillitt, 2 N. D. 255, 50 N. W. 710; Slattery v. Donnelly, 1 N. D. 264, 47 N. W. 375; Cameron v. Great Northern R. Co. 8 N. D. 125, 77 N. W. 1016, 5 Am. Neg. Rep.

454; *Pewonka v. Stewart*, 13 N. D. 117, 99 N. W. 1080, 16 Am. Neg. Rep. 540; *Houghton Imp. Co. v. Vavrowski*, 19 N. D. 594, 125 N. W. 1024.

Where there was evidence tending to support the complaint, and it was of such character that reasonable, honest men might draw different conclusions, it was sufficient, and should have been submitted to the jury. *Cameron v. Great Northern R. Co.* 8 N. D. 125, 77 N. W. 1016, 5 Am. Neg. Rep. 454; *Hoye v. Chicago & N. W. R. Co.* 62 Wis. 666, 23 N. W. 14; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710; *Williams v. Northern P. R. Co.* 3 Dak. 168, 14 N. W. 97; *Franz Falk Brewing Co. v. Mielenz Bros.* 5 Dak. 136, 37 N. W. 728; *Finney v. Northern P. R. Co.* 3 Dak. 270, 16 N. W. 500; *Knight v. Towles*, 6 S. D. 575, 62 N. W. 964; *Mattoon v. Fremont, E. & M. Valley R. Co.* 6 S. D. 196, 60 N. W. 740; *Chicago City R. Co. v. Nelson*, 215 Ill. 436, 74 N. E. 458; *State v. Johnson*, 14 N. D. 288, 103 N. W. 565; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; 29 Cyc. 631; *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; *Calloway v. Agar Packing Co.* 129 Iowa, 1, 104 N. W. 721; *Arenschield v. Chicago, R. I. & P. R. Co.* 128 Iowa, 677, 105 N. W. 200; *O'Neill v. Chicago, R. I. & P. R. Co.* 62 Neb. 358, 60 L.R.A. 443, 86 N. W. 1098; *Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 367, 121 N. W. 830; *Johnson v. Southern P. R. Co.* 154 Cal. 285, 97 Pac. 520; *Dieckmann v. Chicago & N. W. R. Co.* 145 Iowa, 250, 31 L.R.A.(N.S.) 338, 139 Am. St. Rep. 420, 121 N. W. 676.

One who is required to act suddenly and in the face of imminent danger is not required to use the same degree of care as though he had time for deliberation and the full exercise of his judgment and reasoning faculties. 28 Cyc. 521, and cases cited. *Coulter v. Great Northern R. Co.* 5 N. D. 568, 67 N. W. 1046; *New York, S. & W. R. Co. v. Moore*, 45 C. C. A. 21, 105 Fed. 725; *Dougherty v. Chicago, M. & St. P. R. Co.* 20 S. D. 46, 104 N. W. 672; *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 150, 33 N. W. 161; *Union P. R. Co. v. Ruzicka*, 65 Neb. 621, 91 N. W. 543; 7 Am. & Eng. Enc. Law, 427-436; 33 Cyc. 901.

BURKE, J. Plaintiff was injured in a collision with defendant's train, at a grade crossing within the city limits of Bottineau, North Dakota. The road upon which he had traveled to reach the city runs due south, and the street upon which he was traveling at the time of the injury coincides with the said section line. The defendant's train approached from a direction which may be designated as northwest by north. Thus plaintiff was driving into the town from due north and the train was approaching the town from a direction half way between north and northwest. The depot at which the train would stop was situated about 400 feet to the south and beyond the crossing aforesaid. There was also a side track parallel with, and 50 feet north of, the main track at the place where the street intersected the right of way. From the testimony and from a photograph it is apparent that the wagon road makes a slight turn at the crossing, but does not cross the track at right angles. From careful calculation we have reached the conclusion that the distance between the centers of the main and side tracks at the crossing is in the neighborhood of 75 feet. At the time of the accident there was a string of box cars standing upon the side track immediately west of the crossing, which would tend to obstruct plaintiff's view of the main track as he approached from the north. The accident happened upon the 21st day of December, 1910, about 1:30 p. m., and the testimony shows that the weather was foggy and thick, but not so dense but that a train might be seen for at least a quarter of a mile. The train consisted of seven freight cars and an engine, and plaintiff was driving a team of horses drawing a sleigh upon which he had about a cord of wood. Plaintiff drove over the main track, ahead of the train, but the rear end of his load was struck by the engine and upset. He claimed injury to the sled and harness and to his person. The jury awarded a verdict in the sum of \$450. Defendant and appellant insists that plaintiff was guilty of contributory negligence which precludes his recovery. The question is decisive of the case, and will be the only one considered.

(1) The law relative to contributory negligence in crossing accidents is well settled in this country at large and in this state. The authorities are agreed that in order to constitute contributory negligence as to matter of law, the facts and circumstances must be such that no other inference can fairly and reasonably be drawn therefrom. See valuable Case Note at page 963, vol. 11 L.R.A.(N.S.) where the authorities are col-

lected and reviewed. 29 Cyc. 631, and cases cited. *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 781; *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 367, 121 N. W. 830; *Hope v. Great Northern R. Co.* 19 N. D. 438, 122 N. W. 997; *Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co.* 20 N. D. 642, 127 N. W. 993; *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 24 N. D. 40, 138 N. W. 976. In the *West* Case it is said: "The ordinary precaution required of one approaching a railroad crossing, when he has no knowledge of the close proximity of the train, is that he look and listen and make a diligent use of all his faculties to inform himself and avoid collision. Where a view of the track in either direction is obstructed before reaching the point of danger, extra precaution is required to ascertain danger through the sense of hearing. When the exercise of these ordinary precautions would have avoided the accident, negligence is conclusively established." In the *Pendroy* Case it is said: "A person about to cross a track must bear in mind the dangers attendant upon crossing, and vigilantly use his senses of sight and hearing in the endeavor to avoid injury." In the same case it is said: "Traveler . . . is rigidly required to do all that care and prudence would dictate to avoid injury, and the greater the danger, the greater the care that must be exercised to avoid it. And where because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances, it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary; and under such circumstances there can be no excuse for a failure to adopt such reasonable precautions as would probably have prevented the injury," quoting from 7 Am. & Eng. Enc. Law, 2d ed. pages 427-436. Nothing remains then but to apply the well-settled law to the facts in the case at hand. As already stated, plaintiff approached the crossing from due north, while the train approached from a direction designated as north by northwest, thus approaching from nearly the rear of plaintiff's rig. Plaintiff had used this crossing for eleven years every time that he came to town, sometimes two or three times a week. As he approached the crossing, the land between him and the main track

was level, and there was nothing to obstruct his view excepting the box cars which stood upon the side track. He had a cap pulled down over his ears to protect himself from the cold. He had no bells upon his team, and the sled made no noise. He testifies that his sight and hearing were good, and that the horses were walking when he was crossing the track, but had hurried up a little, and were trotting before the engine struck the sled. The testimony places the speed of the train at between 8 and 20 miles per hour, the engineer giving the lowest speed, saying that he intended to stop at the depot. All of plaintiff's witnesses excepting himself testified that the speed of the train was about 12 miles an hour. Plaintiff at the time of the accident was therefore traveling at a speed approximately one third of the speed of the train, while prior to the collision the train was probably going from four to five times as fast as the team. Plaintiff testifies that he looked for the train before he got to the tracks, and that after he got to the track the cars prevented him from seeing the train, and that he saw quite a distance up the track. He further testifies that he believed the train was about 2 rods from him when he first saw it. Again he testifies: "I didn't look for trains from the northwest until I came over close. I didn't get a chance to look after that train. I didn't get a sight of any train until after I crossed the side track. That wasn't the first time I looked to see if the train was coming. I looked when I was further north on the road. I can't say how far. The first time I looked after I had passed the side track was when my horses were about on the second track after I got past the cars on the side track, I might have been able to see for a mile or so up the main track if it had been clear weather. The track is straight, and I believe you could see 7 or 8 rods anyway. When I first came to the side track, the team was walking a common walk they use on the road. Before I got to cross the track the team started to trot. When we cross the track I hurry them up to go faster across the track. I am afraid crossing the track. The horses were walking when I first saw the train, and started to hurry up." And again he says: "After I got by the cars so I could see, I commenced looking. I believe I did commence looking before the horses got on the second track. I can't say how close they were to the first track when I first looked. The horses were not far enough away from the second track when I first saw the train so that I could have turned off if I wanted to." And

again he says: "I mean the horses were actually on the track before I saw the train, I can't say anything different."

An analysis of the above testimony shows that plaintiff drove over the side track containing the box cars, at a speed between 3 and 4 miles per hour, and that he could see the train approach upon the main track had he looked. At that instant he was about 65 feet from the place where he was struck by the train. If he made those 65 feet at the rate of 5 miles per hour, and the train was approaching at a speed of from 15 to 20 miles per hour. The train must have been between 260 and 325 feet from the crossing when plaintiff had his first opportunity to see it. At that time his horses were about 40 feet from the main track, and it would be easily possible for him to stop or turn aside and thus avoid the collision. It clearly was his duty to look up the track immediately after passing the box cars upon the side track, and a failure to look would be such negligence upon his part as would preclude his recovery. From the evidence it seems plain that he neglected to look until his horses were nearly, if not quite, in front of the approaching train and the engine was within two rods of him. This is the plain import of plaintiff's own testimony, and we do not believe reasonable minds should differ in reaching the conclusion that this failure to look was the proximate cause of his injury. If, however, plaintiff takes the other horn of the dilemma, and insists that he did look immediately after passing the cars upon the side track, then reasonable minds must agree that he saw the train and decided that he could pass safely in front of it. In either case, his own negligence caused, or at least contributed to, the collision and consequential injury. When both parties are negligent it is not possible to make an equitable distribution of the damages, and neither party can recover. It was thus the duty of the trial court to direct a verdict for the defendant at the close of the case, or, failing in this, to grant judgment notwithstanding the verdict, when such motion was made. The judgment of the trial court is reversed, and judgment ordered entered for defendant notwithstanding the verdict.

MOUNTRAIL COUNTY, a Municipal Corporation, v. GEORGE W. WILSON and Clara J. Wilson, His Wife, T. S. Slingerland, et al.

(146 N. W. 531.)

During the election to determine the location of the permanent county seat of Mountrail county, George W. Wilson offered the county and its electors that he would donate to the county, if Stanley should be chosen as such county seat, half a block of land for courthouse purposes. Upon Stanley being chosen he deeded to the county a half block of land, reciting in the deed that the same was "to be used for courthouse and other necessary county buildings, and that only," for which conveyance a formal consideration of \$1 was paid by the county. At that time a building used as a county jail was situated on that tract, and is still thereon and used for jail purposes. In 1912 the voters authorized bonding for \$50,000 for courthouse purposes, and bonds to that amount have been sold, and a contract entered into for the erection of a county courthouse. Last September the county commissioners determined by resolution that half a block was inadequate in area as a site, and entered into a contract with B. W. Taylor, of Stanley, wherein he agreed to convey to the county a one-half block tract as a gift, and furnish the means to procure by condemnation proceedings an additional one-half block adjacent thereto, the county to thus acquire a full block of land, free of cost, to be used as a courthouse site. Under this arrangement Taylor donated a one-half block, deeding the same to the county, it accepting title, and also delivered the county his certified check to be used in payment of the costs of this action and the value of the property sought to be obtained by this action in condemnation. The county commissioners then designated the Taylor tract as the courthouse site and entered into a contract for the erection thereon of the courthouse. The land adjacent thereto and sought to be obtained by these condemnation proceedings belongs to Wilson, the donor of the first courthouse site adjudged inadequate by the commissioners. Wilson defends, contending: (1) That the county was without power to procure the Taylor tract and that the county's title to the same is void. (2) That the acceptance of the Wilson tract, under the clause contained in the deed, precluded and estopped the county from erecting a courthouse at any other place than upon the Wilson site. (3) That by using the Wilson site for jail purposes the county had accepted same, and it had become a courthouse site. (4) That by failing to submit with the bonding proposition the question of the purchase of a site, the county was without power to acquire another site. (5) That the county commissioners are powerless to change from one established courthouse site to another until the voters of the county, by a majority vote, shall have first authorized a sale of the first site. (6) That the selection by the board of one

site exhausts the power of the board to change therefrom by the selection of a new site. *Held:*

County — may acquire by gift — sites for county buildings — title — acceptance — purpose.

1. The county may acquire by gift any number of grounds as sites for county buildings, whether used for such purposes or not; and the acceptance of title to one site did not bar it from accepting title to another site donated the county, even though both were inadequate for the purpose.

County — sites — donated.

2. The county has not purchased any site, but possesses two inadequate sites, both donated.

Condemnation proceedings — may acquire sites — vote of people — note necessary.

3. Section 2406, Rev. Codes 1905, empowers the county to acquire by condemnation proceedings additional ground adjacent to an inadequate site to constitute an adequate and suitable site for county buildings, and this without authorization by a vote of the electorate of the county.

Tract — donation — proper site — county — estoppel — right of choice — in county.

4. The tract donated by Wilson has never been adjudged to be an adequate, proper, or suitable site for courthouse purposes, and no conditions contained in a deed donating real property for public purposes can preclude or estop the county or the public, acting by its legally constituted authority, from the free right of choice of a site for public buildings. An individual cannot contract with the county and thereby compel it to use land granted for a county courthouse site, because a private citizen cannot acquire a private interest as against the public in the matter of the location of public buildings. He can have no more right in the selection of a site than any other citizen, and can acquire no right not possessed by every other citizen, and, therefore, can have nothing upon which to urge an estoppel against the county or the public. Nothing contained in the deed prevented the free exercise of the right of choice and the selection of different sites than the one donated by Wilson.

Site legally chosen — county board — change of location — question not here involved.

5. The Wilson site never having been legally chosen and designated as a courthouse site by the board, upon whom the duty of selecting a site devolved by law, no question of change of location from one established site to another is involved. The question of the right of the board, without authorization by a majority vote of the electors of the county, to change from an established courthouse site to another as the site upon which a new courthouse is to be erected, is not before us, and is not determined.

Sale of county lands not involved — sites for county buildings.

6. There being no question of sale of county lands involved, the provisions of § 2299, Rev. Codes 1905, authorizing the purchase of new county grounds in lieu of those already had, and provided that the old tract should not be sold until authorization is first obtained by a majority vote of the people of the county, has no application to the case at bar. The Taylor site is not acquired in lieu of the Wilson site, and the provisions of this section do not prohibit the acquirement by gift of many grounds from which the commissioners may choose one adequate site.

County board — authority — title to sites — action in condemnation — jury — verdict.

7. All contentions of the respondent Wilson that the board has acted without authority of law in procuring the Taylor site are adjudged not well taken, and title is quieted in the county to the Taylor tract; and as to the additional half block belonging to Wilson, adjacent to the Taylor site, and the subject-matter of this action in condemnation, title thereto will be vested in the county upon the county paying into the court for defendant George W. Wilson the value thereof, determined by the verdict of the jury to be \$200, together with Wilson's costs and disbursements of this action on trial and on appeal.

Public use — taking of land for — necessity — established.

8. The necessity of the taking of the land in question for such public use is established. The necessity for the exercise of the power of taking was for the board, and is not for the courts to determine.

Judgment — dismissal — state Constitution — full compensation — costs — recovery — appeal.

9. Defendant Wilson, in the lower court, recovered a judgment of dismissal, and the county appeals therefrom and prevails. *Held* that under § 14 of the state Constitution, requiring full compensation to be first paid the owner before the taking of private property for public use by condemnation, the costs of this appeal, as well as the costs of trial below, are but a necessary part of the ascertainment of the amount of damages to be paid for the property taken. Hence respondent Wilson will recover of the county his actual necessary costs and disbursements allowed in that behalf by law, both on trial and on this appeal, notwithstanding the county prevails on this appeal, a different rule from ordinary cases here applying under § 14 of our state Constitution. To assess costs against Wilson would be a deduction from the full compensation to "be first made in money" as "ascertained by a jury" within such constitutional provision.

Judgment — decree — county — payment — amount — costs.

10. Judgment ordered vacated on the findings of the trial court confirmed, and judgment and decree in conformity herewith in favor of the county as to its right to take the property in question upon the payment of \$200, interest,

costs, and disbursements to respondent George W. Wilson is directed to be entered.

Opinion filed March 7, 1914.

Appeal from the District Court of Mountrail County, *Frank Fisk*, J.

Reversed.

F. F. Wyckoff, State's Attorney, and *Henry J. Linde*, for appellant.

By virtue of the deed from Wilson, Mountrail County acquired title to and possession and control of the property therein described. The estate conveyed was not one on *condition*. 2 Washb. Real Prop. p. 3, § 2; *Garfield Twp. v. Herman*, 66 Kan. 256, 71 Pac. 517; *Curtis v. Board of Education*, 43 Kan. 138, 23 Pac. 98.

A deed absolute, but specifying the purpose for which the property conveyed shall be used, *does not* create an estate upon *condition subsequent*. *Soukup v. Topka*, 54 Minn. 66, 55 N. W. 824; *Faith v. Bowles*, 86 Md. 13, 63 Am. St. Rep. 489, 37 Atl. 711; *Farnham v. Thompson*, 34 Minn. 330, 57 Am. Rep. 59, 26 N. W. 9; *Wier v. Simmons*, 55 Wis. 637, 13 N. W. 873; *Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90; *Ecroyd v. Coggeshall*, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260; *Kilpatrick v. Baltimore*, 81 Md. 179, 27 L.R.A. 643, 48 Am. St. Rep. 509, 31 Atl. 805; *Huron v. Wilcox*, 17 S. D. 625, 106 Am. St. Rep. 788, 98 N. W. 88; *Greene v. O'Connor*, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364, 3 Ann. Cas. 36; *Warren County v. Patterson*, 56 Ill. 111.

Since the Wilson tract was deeded to the county for public purposes, it is contended that the county has no power to sell or dispose of such land. Such is not the law. Rev. Codes 1905, § 2377; *Colburn v. El Paso County*, 15 Colo. App. 90, 61 Pac. 241; *Kendall v. Frey*, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466.

How and where a public building shall be erected is necessarily a question of public policy. Courts cannot wisely review the action of the public authorities on such subject. *Judd v. Fox Lake*, 28 Wis. 587; *Crow v. Warren County*, 118 Ind. 51, 20 N. E. 642; *Way v. Fox*, 109 Iowa, 340, 80 N. W. 405; *Mahon v. Norton*, 175 Pa. 279, 34 Atl. 660; *Bennett v. Norton*, 7 Kulp, 443; *State ex rel. Norman v. Smith*, 46 Mo. 60; *Simpson v. Bailey*, 3 Or. 515; 11 Cyc. 380; *Lawrence*

County v. Hall, 70 Ind. 469; 1 Dill. Mun. Corp. 3d ed. 38; Kokomo v. Mahan, 100 Ind. 242; Bosley v. Ackelmire, 39 Ind. 536; Platter v. Elkhart County, 103 Ind. 360, 2 N. E. 544.

Greenleaf, Bradford, & Nash, for respondents.

The county accepted the lands as and for a courthouse site, and such was the intention of all parties. *Stafford County v. State*, 40 Kan. 21, 18 Pac. 889.

In the absence of statutory authority, a board of county commissioners cannot review or reverse acts of a prior board, performed within the scope of their authority. *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190; *Rev. Codes 1905*, §§ 2377, 2399.

Repeals by implication are, in any event, not favored. *State ex rel. State Farmers' Mut. Hail Ins. Co. v. Cooper*, 18 N. D. 583, 120 N. W. 878.

The question of a site for courthouse and county buildings should be submitted to the voters. *Rev. Codes 1905*, § 2399; *Waring v. Cheraw & D. R. Co.* 16 S. C. 416; *Creighton v. Pringle*, 3 S. C. 79.

The defendants, having been brought into court, are entitled to raise any question by way of defense; they have rights as taxpayers. 11 Cyc. 405; *McCann v. Carlson*, 26 N. D. 191, 144 N. W. 92.

Points here raised by appellant, not having been raised and presented in the trial court, cannot be considered. *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243; *Van Gordon v. Goldamer*, 16 N. D. 323, 113 N. W. 609; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558.

The judgment of the county board is final and conclusive on the question of the necessity or acquiring additional ground for the use of county buildings. *Rev. Codes 1905*, §§ 2406, 2566; *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10.

The county board may locate the county buildings on any one particular piece of ground obtained for such purpose, even though other tracts have been acquired. *Rev. Codes 1905*, § 2399; *James v. Gettinger*, 123 Iowa, 199, 98 N. W. 723; *Vance v. District Twp.* 23 Iowa, 408; *Atkinson v. Hutchinson*, 68 Iowa, 162, 26 N. W. 54; *Carpenter v. Independent Dist.* 95 Iowa, 300, 63 N. W. 708.

The official acts of a board of county commissioners cannot be at-

tacked in a collateral proceeding by a defendant, or in a direct action in his individual capacity, unless his beneficial interest therein, as a taxpayer or otherwise, is alleged and proved. Rev. Codes 1905, §§ 2423, 7810; *Cleveland v. McCanna*, 7 N. D. 457, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908; *San Luis Obispo County v. Simas*, 1 Cal. App. 175, 81 Pac. 974; *Waugh v. Chauncey*, 13 Cal. 11; *Norris v. Farmers' & Teamsters' Co.* 6 Cal. 599, 65 Am. Dec. 535; *Fall v. Paine*, 23 Cal. 302; *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549; *Ruthstrom v. Peterson*, 72 Kan. 679, 83 Pac. 825; *Culpeper County v. Gorrell*, 20 Gratt. 484; *Bryant v. Logan*, 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011; *McCann v. Carlson*, 26 N. D. 191, 144 N. W. 92.

Goss, J. This action is one for condemnation of land for public use. The complaint is in the usual form, alleging that the present and designated courthouse site is owned in fee simple by Mountrail county. That "it is necessary for plaintiff to acquire title to another tract of land, adjoining the land described on the west, in order to have sufficient ground for said courthouse and jail and such other necessary county buildings as may be constructed by the plaintiff in the future for the use of the county; that the land described in ¶ 3 (the established site) alone is insufficient for the needs of the plaintiff in the construction of said courthouse and jail and other buildings, and that in order to have such a site for the construction of such buildings as will meet with the present and future needs and requirements of the plaintiff, the plaintiff will require and does now require the acquisition of title to that certain tract of land described in ¶ 2." The tract sought to be appropriated is about one half of a block, described by metes and bounds, and belonging to defendant Wilson. Plaintiff seeks to have the necessity for the taking, together with the value of the property to be taken, determined. The defendants admit their ownership of the tract in question, and deny the ownership by the county of the site designated. Further defense is made that at the general election in 1912 there was submitted to the voters of the county the question of bonding in the sum of \$50,000 for the purpose of constructing a courthouse for said county, which question carried and bonds so authorized were sold, but that said proposition so submitted did not include authorization for

the construction of a jail for said county, or the procuring of a site on which to build and construct a county courthouse and jail.

Defendants aver that prior to said election and for some years the county was and now is the owner in fee simple of a tract of land particularly described. "That the board of county commissioners of the plaintiff selected and procured the above-described land and premises to be used as a site upon which to build and construct a county courthouse and other necessary county buildings for the use of said county aforesaid." This tract is a different tract at said county seat than the one officially designated by the present board of county commissioners as the courthouse site and upon which the erection of a courthouse has been begun. Defendants allege also that the resolution of the board of county commissioners, dated September 23, 1913, designating that the courthouse shall be built upon the newly acquired site and the contract and agreement for the purchase thereof, was then and is now fraudulent and void as were all acts and proceedings of the present county board in procuring and designating the present site upon which the courthouse is being built.

The proof offered was embodied by the court in its findings, from the judgment upon which the appeal is taken, with the facts thus admitted. The court found that the city of Stanley was selected by a majority vote of the people of the county at the November, 1910, election as the county seat, which vote was canvassed and the result declared November 22, 1910. That during that county-seat election defendant Wilson had offered to the county and its electors that if the city of Stanley was chosen as the permanent county seat that he would convey to the county a half block of land in said city. That a deed to said tract was prepared October 25, 1910, and delivery thereof to the county commissioners was made after the result of said election was generally known, and was placed of record November 10, 1910, the county paying as a formal consideration the sum of \$1, paid by warrant duly audited and allowed, received and cashed by Wilson on November 11, 1910. Said deed was in the usual form of deed of warranty, conveying the land particularly described "to be used for courthouse and other necessary county buildings, and that only." No clause is contained in the deed that the lands on breach of condition should revert back to the grantor. So that at the 1910 general election the permanent county

seat was established at the city of Stanley and immediately the county became vested with title to a half block of land deeded to and received by it "to be used for courthouse and other necessary county buildings and that only." A county jail had been erected on this site in the summer of 1909, by the county commissioners, and prior to the acquisition of title by the county the following year. This building has been used as a county jail ever since and is still upon said tract.

That at the 1912 general election the question of bonding the county for \$50,000, to procure funds with which to erect a county courthouse, was submitted and authorized by a majority vote of the electors, and pursuant thereto the bonds were sold and funds were secured with which to build the county court house. The county has recently entered into a contract for its erection upon a different site acquired by warranty deed executed October 16, 1913, in area about a half block and within said county seat, and which second and officially designated site we name, for convenience of reference, the Taylor site, and the old site first acquired we designate the Wilson site, or the one granted by gift of Wilson to the county in 1910. The Taylor site was secured under an agreement between the county commissioners and one B. W. Taylor, wherein he agreed that if the land in question would be designated by the board of county commissioners as the official county courthouse site, and the new courthouse authorized to be erected built thereon, he would procure the conveyance of title in fee to the county of this half block, and in addition thereto would indemnify the county against all cost arising from these condemnation proceedings in the acquiring of title by the county of such additional land adjoining the Taylor site as the county commissioners considered necessary for courthouse purposes, accompanying his offer with a certified check, accepted by the county commissioners, to be used in the payment of expenses and damages of this suit in the acquiring of title to the land sought to be condemned. In brief Taylor's offer is that he will deed a half block free and hold the county harmless in the procurement of title to this land sought to be condemned by paying the amount of the judgment awarded in condemnation proceedings as the value of the property and costs, the county thereby acquiring an area of about a block for court house purposes without cost to the county. This proposition met with favor by the board of county commissioners and on September 23, 1913, when

in regular session, they officially designated the entire block as a site for the new county courthouse, after which Taylor conveyed to the county the half block owned by him. And these proceedings are begun to condemn land adjoining the Taylor site which is owned by Mr. Wilson, the grantor to the county of what we may term the rival Wilson site. On September 23, 1913, the day the county commissioners selected the Taylor site and officially designated that to be the site upon which the new courthouse was to be erected, they also by resolution determined that one-half of a city block, the approximate area of the land deeded by Taylor, and the area of the Wilson site as well, was insufficient upon which to construct a courthouse and other necessary county buildings. Thus at the commencement of these proceedings we find the county the owner of two different tracts, each half a block in area and both donated by generous and public-spirited citizens for the same county purpose. While title to the Wilson site has been in the county for three years no resolution officially designating it as a courthouse site or for courthouse purposes has ever been passed by the county commissioners. Respondents, however, urge that the equivalent has been done in that the submission of the proposition of bonding for courthouse purposes did not, as might have been done under § 2565, Rev. Codes 1905, also contain the question of purchase of a site for the courthouse, and that therefore the county commissioners, in behalf of the county, by necessary inference held out to the electorate that the county had a sufficient site and that none need be purchased inasmuch as a purchase was not mentioned and hence none authorized. The jury has found that the tract condemned as a necessary addition to the Taylor site is of the value of \$200. We may take judicial notice also of the fact that since the county division in 1908, wherein Mountrail county was created out of what had been a part of Ward county, up to the present time no courthouse has been built, the county having been occupying temporary quarters. The first county courthouse will be the one in course of building. The conclusion of the trial court from the foregoing facts found was that the county by "continued use of said tract (Wilson tract) for jail purposes, in law accepted and designated the same as a courthouse site; that the plaintiff cannot select another courthouse site or acquire title to the real estate described, (the Wilson land adjacent to the Taylor site) and which is sought to be condemned for a part of the court-

house site, until the board of county commissioners have been authorized by a majority vote of the electors of said county to and shall actually dispose of the site referred to in paragraph 5 of the findings herein known as the Wilson site; that this action be dismissed." The trial court's decision was based upon the theory that the exercise by the county board of the right of choice as to a courthouse site exhausted their power to further consider the matter or later select a different courthouse site, assuming that as a matter of law the first tract acquired, the Wilson site, had without affirmative action of the commissioners other than by accepting a deed to it with a jail structure thereon, amounted to a determination that it was the site upon which any future courthouse must be constructed, unless by a majority vote of the electors of the county the board was authorized to sell the Wilson site before acquiring a new one. That in any event but one site at a time could be legally acquired.

The county is a body corporate and as such may be the grantee of land to be held for public purposes, (§ 2377, Rev. Codes 1905,) and may purchase grounds for sites for county buildings. (Rev. Codes 1905, §§ 2563-2566.) Whether a purchase of one site may be made while the county has an adequate site for a county courthouse is not before us, for two reasons: (1) It has been adjudged by the county commissioners, the body to whom discretion to pass upon this matter has been entrusted, that a half block is insufficient upon which to erect this courthouse, thereby adjudging the Wilson site to be inadequate, assuming that it once had the status of a legally chosen and designated site for county buildings; and (2) the county is not purchasing and has not purchased a second site. It possesses two inadequate sites, both donated.

It has been found necessary to purchase an adequate site or to add to one or the other of these two by the acquirement of adjacent land to make whichever of the two is chosen adequate for the county purpose to which it is to be devoted. The issue is no different because it involves adding adjacent ground to the Taylor site than it would be had this action been to secure in the same manner an addition to the Wilson site, had that been chosen instead. In neither case has the county purchased a site while it had an adequate one. And this likewise disposes of the contention of respondent that inasmuch as the bonding proposition failed to include the purchase of a site the county should be

presumed to have one and on such presumption could not obtain another by purchase. Necessarily the only purpose of bonding is to procure money to erect a building, purchase a site or do both. Where there is no necessity to purchase it is sophistry to contend it to be necessary to bond to procure money that need not be thus expended. The law never requires an idle, useless act. Section 2565 has reference to the raising of money by bonding for certain purposes. It cannot be construed as a limitation upon the right of the county to take by grant real property donated for public purposes. Perhaps the board of county commissioners, prior to bonding, assumed the Wilson site to be adequate in area. Possibly again the board at that time may have intended to use that site as a nucleus from which to condemn adjoining land sufficient to constitute it an adequate site, and hence did not submit the question of purchase of a new site as a part of the bonding proposition. In any event the time for the determination by the board of the adequacy of the site had not then arrived. That time came when with the money in hand with which to build the question arose of where county buildings should be permanently located. Another site is then acquired by gift, and for the first time a choice was afforded between free sites owned by the county, as well as the question of what site should be chosen and designated as an adequate and suitable one.

The selection of one site is not final, and does not exhaust the power of the board vested with the right of choice to choose another before erection of building is begun. 11 Cyc. 380; *Platter v. Elkhart County*, 103 Ind. 360, 2 N. E. 544. "The power . . . over the location of public buildings is a continuing one." *Graham v. Nix*, 102 Ark. 277, 14 S. W. 214-218. And the power to acquire by eminent-domain proceedings an addition to an inadequate site already possessed is expressly authorized by § 2406, without the necessity of submitting such question to a vote of the people, even though it may result in what would otherwise be in law an extraordinary expenditure, and beyond the power of the board without authorization by the electorate. Possessing, then, title in fee to an inadequate site, all question of power or right of the commissioners to act as done in this case is settled by § 2406, Rev. Codes 1905.

Much discussion is contained in the briefs on the right of the commissioners to change the location of the courthouse site as from an

established site to another of their choosing. All this is without this case for the reasons: (1) That the Wilson site, although a jail site, has never been determined as an adequate, proper, and suitable site for any other county building. (2) It has been determined as inadequate as a proposed courthouse site. (3) It has never been an established courthouse site. No change from an established to a new site for such purposes is here involved. (4) Grant that the deed from Wilson was accepted with the understanding between Wilson and the county board that it was accepting a proposed site upon which at some time a courthouse would be built; and that the board contemplated and intended at that time to erect the courthouse upon that site, and with such understanding it was conveyed to and received by the county. Yet the present board, charged with the duty of the selection of an adequate site, and ready to build, cannot be precluded or estopped from selecting a site in its judgment better than the one first secured, the county possessing both sites from which to choose, and able to procure either one without cost. In such an event someone must make a selection, the determination of a legislative or political question, and the county commissioners are the body whose selection under the law is final, except where fraud, bribery, or the like may invalidate a choice made. *Crow v. Warren County*, 118 Ind. 51, 20 N. E. 642; *Rotenberry v. Yalobusha County*, 67 Miss. 470, 7 So. 211; *State ex rel. Norman v. Smith*, 46 Mo. 60-63; *Graham v. Nix*, 102 Ark. 277, 144 S. W. 214; 11 Cyc. 380. While in the answer fraud is alleged, none is shown, and the question is abandoned on argument. A private party can have no more than a citizen's interest in the question of where a public building is to be located. He cannot, even by contract, acquire any private interest in such public matter. Hence by his gift of a site for such public purposes no private interest could be acquired by Wilson in the future location of the county courthouse. He has no more right than any other citizen in the matter, and can acquire no right upon which to urge an estoppel against the county because of its acceptance of his commendable generosity. In fact, his contention as urged by his counsel is not made in the spirit of private interest, but instead as for the general welfare. This in itself in effect negatives an estoppel, for the public itself cannot estop the public. For authority under stronger facts than here, see *Colburn v. El Paso County*, 15 Colo. App. 90, 61 Pac. 241, wherein

a part of the stipulated consideration of the sale of a courthouse site was agreed to be benefits to the seller from the location of the courthouse thereon, and because of which it was in effect stipulated no removal should be had in the future. The site sold under such agreement became the established courthouse site, remaining such for twenty years, when a board of county commissioners subsequently changed from such established site to a new one as the site of a new courthouse to be erected. It was held that notwithstanding the stipulated consideration under which the site was originally deeded to the county, that the agreement did not operate as a bar to removal or change of location of the county buildings, such provision against removal being utterly void as beyond the power of the county officials to perpetually bind the county in such manner. "Any contract which will disable a public or quasi public corporation from performing the duty which it has undertaken, or has been imposed upon it for public weal, is void," citing many cases, among others *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079. "But the power of governing is a trust committed to the people to the government, no part of which can be granted away. . . . These several agencies can govern according to their discretion, if within the scope of their general authority while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" And again quoting from *Colburn v. El Paso County*: "In the early settlement of county seats a small area of ground and a small building only are usually necessary for a courthouse. In after years when the town may have increased in wealth and importance and population, public interest might imperatively demand that a different location be selected, that a much larger building be erected; and yet if the theory contended for in this case be correct the public would be powerless because, years before, some board of county commissioners had made for them a contract which absolutely precluded any chance for future relief. . . . If its legal effect was to compel the county to perpetually use the ground conveyed for a courthouse a most anomalous condition of affairs would arise. The contention of the plaintiff cannot be for a moment sustained. It is manifestly contrary to every principle of public policy." This is the opinion of the court of appeals of Colorado on facts very similar to

those before us. See also *Allen v. Lytle*, 114 Ga. 275, 40 S. E. 238, and *Kendall v. Frey*, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466.

The trial court held in its conclusions of law, that the county commissioners were powerless to select or acquire title to the Taylor site until the Wilson site had been sold. This was on the theory that the Wilson site had become an established courthouse site, which is contrary to fact and law. Assuming the Wilson site to be the duly selected and established site for this courthouse, it is argued by respondents that "§ 2399 confers upon the board the authority to sell public grounds and to purchase other grounds in lieu thereof," but not until authority to sell has been submitted to vote and been authorized by a majority vote of the people of the county, as provided by § 2399. Respondents contend that as no vote has been had on the sale of the Wilson site, it cannot be sold, and a site "in lieu" of it cannot be purchased until such sale had or authorized of the Wilson site. Under such reasoning the commissioners would be obliged to either build upon the site by them adjudged inadequate, the Wilson site, or else suspend and delay building until these questions can be submitted to the people, when, perchance, an adverse vote on the question of sale may defeat the very purpose for which bonds were voted, that is, the erection of this courthouse, or compel it to be placed upon a cite adjudged inadequate; in which event the judgment of the board authorized by law to pass conclusively upon the adequacy and propriety of the location is in turn nullified and denied. The fundamental error is in assuming the commissioners are purchasing a site, conceding without adjudging respondents' contention to be otherwise correct. The Taylor site is not one purchased or acquired in lieu of the Wilson site, assuming also the latter to be the legally designated courthouse "grounds," contrary to fact. Section 2399 was not enacted with reference to the sale of any particular public grounds, but is a general limitation on the power of the commissioners to dispose of county grounds without sanction of the people first obtained. It has no relation to the question before us. This section may apply should the county commissioners determine that either of these tracts donated to the county should be sold. As already emphasized, when considering the Wilson site we are speaking of public grounds, and not an established courthouse site. There is no question before us of a change from one

courthouse site to another one. This county is possessed of two plots of ground. It never has had a courthouse nor a courthouse site. Its properly constituted authority has designated both of these tracts inadequate as such sites, but has taken one of them as a nucleus to which to add, by eminent domain proceedings, sufficient territory to constitute the same what it has designated as a site and found to be adequate in area when such additions are acquired. Then, for the first time, there will be in fact and law an established site adjudged to be adequate for courthouse purposes.

What we have said in passing upon the foregoing questions assumes, without deciding, that they are properly raised, and that respondents are in position to urge them.

Coming now to the issues usual to actions in eminent domain, we pass upon the contention of respondent, that "the record is silent as to the necessity of the taking of the land in question for such public use." "The necessity for the exercise of the power" is conclusively determined by the board, and is beyond judicial review. *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10. This is the equivalent of saying the finding of inadequacy of one-half block for courthouse site purposes, and necessity of half a block more to make an adequate site, is beyond question as a legislative, and not a judicial, matter. This leaves the only question to be whether this particular ground, half block sought to be taken, is adjacent to the Taylor tract and necessary to be taken in extending the Taylor site to a block in area. This is settled in the appellant's favor by the trial court's findings 9 to 15.

This passes upon all questions raised adversely to the respondents' contentions. It is ordered that upon the findings of fact as found by the trial court under the pleadings that the judgment entered be vacated, and the usual judgment and decree in condemnation will be entered, vesting title in fee simple in plaintiff county to the land described in ¶¶ 2 and 7 of its complaint; and also adjudging it to be the owner in fee simple of the land described in ¶ 3 of plaintiff's complaint, upon payment into court for respondent Wilson by Mountrail county of \$200, the value of the land taken, and interest thereon since January 7, 1914, together with respondent Wilson's costs of trial and on this appeal. Defendant recovered a dismissal below, and appellant county cannot, in

eminent domain proceedings, recover costs on its successful appeal, the costs being merely a necessary incident to the ascertainment of the issue of damages under § 14 of the state Constitution. *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392; *Dill. Mun. Corp.* 5th ed. § 1039 note; *Lewis, Em. Dom.* §§ 812 et seq.; *Re New York, W. S. & B. R. Co.* 94 N. Y. 287-294. Defendant Wilson will recover costs and disbursements on trial and on appeal.

Decree ordered entered accordingly.

JOHN KAIN, Sr., and John Kain, Jr., Copartners Doing Business as
John Kain, Sr., and John Kain, Jr., v. L. B. GARNAAS.

(145 N. W. 825.)

Action to recover personal property — chattel mortgage foreclosure — notes — ownership of — judgment — res judicata — subsequent suit — conversion.

1. Where, in an action to recover the possession of personal property for the purpose of foreclosing a chattel mortgage, the defendant puts in issue the ownership of the notes secured by such mortgage, and such issue is determined by the court adversely to the contention to the ownership of the plaintiff, and the jury is instructed to return a verdict against the plaintiff and for a dismissal of the action, the judgment is *res judicata* as to the question of ownership in a subsequent suit brought by the mortgagor and against such plaintiff for the unlawful conversion of the property covered by the mortgage in such prior proceedings.

Notes — chattel mortgage — action — judgment of dismissal — ownership of notes — conversion — illegal seizure of property — tender of payment — prior.

2. Where A made and delivered to B notes secured by a chattel mortgage, and C afterwards sought to foreclose such mortgage and took possession of the property for such purpose, and in such proceeding a judgment was rendered dismissing the action on the ground that the ownership of the notes and mortgage was not in C, an action for conversion can be brought against C for such illegal seizure, even though no tender of payment has been made to B, and subsequent to the prior action and the unlawful seizure C has obtained the possession and title to said notes.

Chattel mortgage — foreclosure — without title to notes secured — conversion — return of property.

3. Where C seeks to foreclose a chattel mortgage without having any right or title to the notes which the same secures, or in and to the said mortgage, and,

preliminary to such foreclosure, wrongfully replevies and obtains possession of such property, the mortgagor may afterwards sue him in conversion for such unlawful seizure, and is not barred therefrom by the mere fact that in the original replevin proceeding he merely prayed for a dismissal of the action, with costs, and did not ask for a return of the said property or for the value thereof.

Discretion — abuse of — complaint — amended complaint — changing the character of the parties — individuals — partners — defendant in court — no objection — prejudice.

4. It is not an abuse of discretion for a trial court to permit the plaintiff to file an amended and substituted complaint changing the character of the plaintiffs from individuals to a partnership, where the members of the partnership and the original plaintiffs are the same persons, and even though no written notice of such amendment has been given to the defendant, but the defendant is present in court by himself or his counsel and has an opportunity to object to and to except to such amendment, and where upon the allowance of such amendment no suggestion is made to the presiding judge that the defendant has a counterclaim against the partnership which he did not have against the partners as individuals, or that his defense is otherwise materially prejudiced.

Pleading — reply — discretion as to.

5. Under § 6863, Rev. Codes 1905, which only provides for a reply "when the answer contains new matter constituting a counterclaim. . . . And in other cases when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion on the defendant's motion require a reply to such new matter," and where no request for a reply is made by the defendant, the fact of a former adjudication of the issues raised by the answer may be proved by the plaintiff even though no reply has been filed by him.

Trial — order of proof — error as to.

6. Although it is irregular for the plaintiff, in proving his case, to introduce in evidence a judgment which acts as an estoppel to the defense of the defendant, yet if the judgment is conclusive as an estoppel, the defendant is not injured because the proof of such judgment was not reserved for rebutting testimony, and the judgment will not be disturbed.

Action for wrongful seizure of property — counterclaim.

7. One who wrongfully seizes personal property and is sued for such wrongful seizure cannot counterclaim in such an action a right of possession of such property, which has been acquired subsequent to the original wrongful seizure.

Opinion filed February 11, 1914. On petition for rehearing March 10, 1914.

Appeal from the District Court of Eddy County, *Coffey, J.*

Action for conversion. Judgment for plaintiffs, Defendant appeals. Affirmed.

Statement by BRUCE, J.

This is an action for conversion. On May 3, 1907, the plaintiffs and respondents purchased from Garnaas Brothers, a corporation, four certain horses, and in payment therefor gave to such corporation their promissory notes secured by chattel mortgage on the horses purchased and other property. Thereafter, and on October 15, 1908, the defendant and appellant, L. B. Garnaas, claimed to own said notes, and sought to foreclose said chattel mortgage, and for the purpose of such foreclosure and on October 15, 1908, brought an action for the possession of the property before mentioned, and, having obtained the possession thereof, sold the same. On the trial of the action, however, which was subsequently had, the court directed the jury to render a verdict in favor of the defendants on the ground that the evidence showed that the corporation, Garnaas Brothers, and not L. B. Garnaas, was the owner of the notes and mortgages sued upon. In this action, however, a dismissal of the action only, with costs, was prayed for by the defendants, and no return of the property was asked or demand for its value made, and the judgment of the court was for a dismissal of the action merely, with costs. The present action is one for the conversion of said property on the 15th day of October, 1908, and all that we can discover in the answer is a defense that the defendant, L. B. Garnaas, is *now* the owner of the notes in question, and that the same have not been paid, and that an action is now pending in the district court of Eddy county between L. B. Garnaas as plaintiff and John Kain, Sr., and John Kain, Jr., as defendants, which involves the right to the possession of the property described, and the judgment in which will determine each and all of the matters involved. All that the answer asks for is a dismissal of the action. Judgment was rendered in favor of the plaintiffs and respondents for \$616.85, and the defendant has appealed from an order denying a motion for judgment notwithstanding the verdict or a new trial and from the judgment entered therein.

Maddux & Rinker, for appellant.

The doctrine of *res judicata* applies only to a final judgment on the merits. *Reilly v. Perkins*, 6 Ariz. 188, 56 Pac. 734.

A tender must be in full and before suit is brought. *Lamb v. Pate*, 4 Ala. App. 628, 58 So. 943.

Must be kept good by deposit. Rev. Codes 1905, §§ 5259, 5263; *Stakke v. Chapman*, 13 S. D. 269, 83 N. W. 261; *Brakhage v. Tracy*, 13 S. D. 343, 83 N. W. 363.

Tender, or offer of payment and deposit, must be pleaded and proved. *Hegler v. Eddy*, 53 Cal. 597; *Bryan v. Maume*, 28 Cal. 238.

A change of plaintiffs from individuals to a copartnership, after trial and submission of the issues to the jury, ousted the court of jurisdiction of defendant and of the subject-matter. *Marienthal v. Amburgh*, 2 Disney (Ohio) 586; *Barron v. Walker*, 80 Ga. 121, 7 S. E. 272.

James A. Manley and Knauf & Knauf, for respondent.

To entitle a person to the possession of personal property under a chattel mortgage, two primary facts must exist. He must be the owner and holder of the notes secured, and also of the chattel mortgage. *Paulson v. Modern Woodmen*, 21 N. D. 235, 130 N. W. 231; *Corbett v. Great Northern R. Co.* 19 N. D. 450, 125 N. W. 1054.

A person appearing in court and disclaiming any interest or title in property is estopped to thereafter set up title to such property. *Hansell v. Hansell*, 44 La. Ann. 548, 10 So. 941; *Miller v. Asheville*, 112 N. C. 759, 17 S. E. 762; *Jones v. Subera*, 25 S. D. 223, 126 N. W. 253; *Bailey v. Wright*, 21 S. D. 349, 112 N. W. 853.

It is well settled that all questions submitted or which ought to have been submitted in the trial and under the issues are adjudicated at the close of the trial. *Eastman v. Cooper*, 15 Pick. 276, 26 Am. Dec. 600; *Gilbert v. Thompson*, 9 Cush. 348; *Porter v. Baker*, 19 N. H. 166

Only the owner can ask or expect a tender. The verdict of the jury, the order and judgment in the former case, adjudicated the matter of the ownership of the notes and mortgage. 22 Enc. Pl. & Pr. 869; 11 Am. & Eng. Enc. Law, 447; *Bailey v. Wright*, 21 S. D. 349, 112 N. W. 853.

The tender made did not require to be kept good by deposit; refusal to accept deposit was waived. *Foster County Implement Co. v. Smith*, 17 N. D. 178, 115 N. W. 663; 1 Van Fleet, Former Adjudication, § 30, p. 130; *Buel v. Pumprey*, 2 Md. 261, 56 Am. Dec. 714; *Deichmann v. Deichmann*, 49 Mo. 107; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; *Klinck v. Kelly*, 63 Barb. 622; *McManus v. Gregory*, 16 Mo. App. 375; *Stapp v. Phelps*, 7 Dana, 296; *White v. Thomas*, 39 Ill. 227.

Motion for new trial on ground of newly discovered evidence is re-

garded with suspicion. The applicant is required to rebut the presumption that the *verdict is correct*, and that he has *not* used due diligence. *Moore v. Philadelphia Bank*, 5 Serg. & R. 41; *Gaines v. White*, 1 S. D. 434, 47 N. W. 524; *Mackin v. People's Street R. & Electric Light & P. Co.* 45 Mo. App. 82.

A new trial will not be granted on a mere showing that new evidence has been discovered. 14 Enc. Pl. & Pr. 773, 791; *Strehlow v. McLeod*, 17 N. D. 457, 117 N. W. 525, 17 Ann. Cas. 423; *Edmonds v. Riley*, 15 S. D. 470, 90 N. W. 139.

Or where the evidence merely tends to discredit or impeach. *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462; *Scheffer v. Corson*, 5 S. D. 233, 58 N. W. 555; *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762; *Braithwaite v. Aiken*, 2 N. D. 57, 49 N. W. 419; *Demmon v. Mullen*, 6 S. D. 554, 62 N. W. 380; *Wilson v. Seaman*, 15 S. D. 103, 87 N. W. 577; *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479; 14 Enc. Pl. & Pr. 798, 799; *Gaines v. White*, 1 S. D. 434, 47 N. W. 524.

BRUCE, J. (after stating the facts as above). The first assignment of error relates to the action of the court in allowing plaintiff to prove the fact of the original action brought by L. B. Garnaas for the possession of the property, and that the same was decided against him on the ground that it was an illegal seizure. This evidence, it is claimed, "put before the jury the fact that the defendant and appellant had suffered a defeat in the district court in an action between the same parties for the possession of this personal property, without the jury having before them the testimony in that action upon which the case was nonsuited, and carried to the jurors the impression that a jury in the former replevin action between these same parties had passed upon the merits of the case on trial adversely to the appellant." In the same connection error is assigned on the action of the court in allowing the jurymen to take to their room as exhibits the verdict, order for judgment, judgment, and answer in said suit. It is claimed that the doctrine of *res judicata* only applies to a final judgment on the merits, and that the testimony and exhibits were therefore inadmissible. We do not, however, so hold. In the former suit the fact of ownership of the notes was in issue. The same parties were the litigants, and therefore on

those questions the decision constituted a conclusive judgment upon the matter of ownership. There was no nonsuit taken, but a verdict was directed in favor of the plaintiffs and respondents herein. It is well established that a case decided on the merits on the questions submitted, or which ought to have been submitted under the trial and the issues, is adjudicated at the close of the trial, and that the fact can afterwards be pleaded by way of estoppel. See *Eastman v. Cooper*, 15 Pick. 276, 26 Am. Dec. 600; 23 Cyc. 1215. It is true that a judgment of voluntary nonsuit is no bar to a subsequent action upon the same claim or demand, nor is the dismissal of an action when brought about by the voluntary action of the party or ordered by the court on some preliminary or technical matter without a trial or hearing, except as to the particular ground on which the dismissal was ordered. "But a judgment dismissing a suit on the merits—that is, on a judicial consideration and determination of the ultimate facts in controversy, as distinguished from mere preliminary or technical issues—is conclusive to the same extent as if rendered on a verdict." And much more must be a judgment which is based upon the verdict of a jury, even though the verdict be directed. 23 Cyc. 1231. The case of *Reilly v. Perkins*, 6 Ariz. 188, 56 Pac. 734, cited by counsel for appellant, is not in point. All that the court there held was that "an interlocutory order, overruling a general demurrer to a complaint, is not *res judicata* of its sufficiency to support a judgment for plaintiff, and hence is no bar to the subsequent vacation of such order at a subsequent term, and the entry of judgment on the pleadings in favor of defendant, since the doctrine of *res judicata* applies only to a final judgment on the merits." In the prior case between the parties to this controversy the cause of action was once finally determined by the verdict of the jury, and the judgment of the court rendered thereon, and no appeal was prosecuted therefrom. The cases, therefore, are materially different.

The next point raised is that the tender in this case was insufficient. It is claimed that the property was taken by appellant about October 1, 1908, and that at that time no tender was made. Not having been made, it is claimed that respondents' sole remedy was redemption from sale. This contention can be and is met by the fact that the defendant and appellant, L. B. Garnaas, had at that time no interest or title in the notes and mortgaged property, and that therefore no tender to him

was necessary in any view of the case. We find no evidence that Garnaas Brothers have instituted any suit or that they are parties to this record.

Appellant next complains that since the plaintiffs and respondents herein, and defendants in the former action instituted by L. B. Garnaas, failed to claim the property or value thereof in such action, they are estopped to recover the same here. There is no merit, however, in this contention. The right of respondents to recover was not litigated or tried upon its merits in the former action, nor was it necessary that it should be. All that was there tried was the fact of the ownership of the defendant and appellant, L. B. Garnaas, and it was not necessary for the defendants in such action to interpose any other issue, or to seek for a recovery therein. All that the answer asked for was a dismissal of the action, with costs.

We see no merit in points two and five, to the effect that no tender or deposit is pleaded, nor is the validity of the chattel mortgages questioned, and that the ownership of the notes in issue was in L. B. Garnaas is not denied by the pleadings. We find, upon an examination of the answer, that although the answer denies that the notes were made and were the property of Garnaas Brothers, and not of the defendant, L. B. Garnaas, there is an allegation that the defendant is the owner and holder thereof, though nothing is said as to how or when he obtained the ownership and possession of the same. The action, however, is one of conversion, and for the wrongful conversion of the property on the 15th day of October, 1908, at which time it is conclusively shown by the prior judgment that the defendant, L. B. Garnaas, had no right, title, or interest, in the notes or mortgaged property whatever. We do not see that the fact that he is now the owner of the notes, if such be the fact, has anything to do with the case in so far as the original conversion was concerned.

The next point made is that after the taking of the evidence, the motions, and the arguments to the jury, the court permitted plaintiff to file an amended and substitute complaint changing the character of plaintiffs from individuals to a copartnership. It is argued that the defendant may have had a counterclaim against the copartnership not available as a defense against the individuals, and for this reason the amendment was vital and prejudicial. It is claimed that defendants' notes were not executed by the copartnership. We really do not see

what the notes had to do with the case. When the property was seized, the defendant did not own the notes, and it was immaterial who executed them. The members of the partnership and the original plaintiffs were the same persons. No written notice, it is true, was given to the defendant of the amendment, but we must assume that defendant or his counsel was in court and actually knew of the amendment, as the record shows that an exception to its allowance was taken by him. In spite of the provisions of §§ 6882 and 6883, Rev. Codes 1905, which allow the utmost latitude in regard to amendments, and in spite of the fact that a partnership is in no sense a legal entity but is made up and composed entirely of its members, we are asked to set aside this judgment because possibly the defendant may have had a counterclaim against the partnership. We do not find, however, that this suggestion was made in the trial court, or that even here the hypothesis is stated in the form of a fact. We think there is no ground for reversal on this score.

Our conclusions upon the necessity of the tender disposes of the remaining assignments of error.

The judgment of the District Court is affirmed.

BURKE, J., being disqualified, did not participate.

On Petition for Rehearing.

The point has been raised on petition for rehearing that proof of the former adjudication was not admissible in this suit as it had not been pleaded by the plaintiff. This point was not raised or suggested upon the original appeal, the plaintiff being contented with alleging that "the doctrine of *res judicata* applies only to a final judgment on the merits," and insisting merely that the judgment in controversy was not such a final judgment. We, however, will consider it here, so that the practice may be settled. Section 6863, Rev. Codes 1905, only provides for a reply "when the answer contains new matter constituting a counterclaim. . . . And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case the reply shall be subject to the same rules as a reply to a counterclaim."

In the case at bar no reply was asked for by the defendant, and no

reply was required by the court. In such cases a reply is not necessary, and the fact of a former adjudication can be proved even though not pleaded. This appears to be the well-established rule under code provisions similar to our own. In the case of *Wixson v. Devine*, 67 Cal. 341, 345, 7 Pac. 776, we find the following: "It was not necessary or proper for plaintiff to plead his former recovery. It operated by way of estoppel to the defense set up by the defendant, and as we have in our system of pleadings no replication in the answer, the estoppel could not properly be pleaded." In the case of *Dows v. McMichael*, 6 Paige, 139, the court said: "As special replications are not allowed in this court, the complainants had no opportunity of pleading the decision of the same question in the former suit as an estoppel. And the rule of law on this subject is that where the party cannot plead the former decision as an estoppel, the record thereof may be given in evidence, and is conclusive and binding upon the party, the court, and the jury, as to every fact adjudicated and finally decided in the former suit."

In the case of *Calkins v. Allerton*, 3 Barb. 171, we have an action of trover against one who was a privy of a third party, by whose command and under whose title the defendant justified the taking. It was held that the record of a former recovery against such third party for the same taking might be given in evidence and was conclusive as to plaintiff's title to the property and right of possession thereof. The plaintiff having had no opportunity to plead the recovery against the third party specially, the evidence was held as conclusive as though pleaded. In the case of *Sprague v. Waite*, 19 Pick. 455, we find the following: "Where a verdict upon a point put in issue in a former action between the same parties might have been pleaded in estoppel before the Statute of 1836, chap. 237, abolishing special pleading, it will now be conclusive when given in evidence under the general issue." 9 Enc. Pl. & Pr. 618. See also *Dunkle v. Wiles*, 6 Barb. 516.

Nor is it material in this case that the record of the former proceeding was introduced in evidence during the presentation of plaintiff's case. "It is urged that the evidence," says the supreme court of California in *Clink v. Thurston*, 47 Cal. 21-30, "if admissible at all, was not relevant and material at the time it was received and before the defendant had attempted to prove any of the facts constituting his defense. No doubt the introduction of the evidence at this time was irregular.

It was in strictness rebuttal evidence merely, and only available to the plaintiff in an attack upon the title or right which the defendant might endeavor to establish. But, if the judgment offered is to have the effect claimed for it by the plaintiff, of a conclusive estoppel upon the defendant, it cannot be material at what stage of the trial it was introduced, for by no possible means could its effect as an absolute bar be avoided. The defendant, therefore, could not have been injured by the irregularity, and we should not reverse the judgment merely because the strict order of trial was not preserved in the introduction of evidence."

We have examined *Heebner v. Shepard*, 5 N. D. 56, 63 N. W. 892, and the reference to 18 Enc. Pl. & Pr. 642, but can find no support for defendant and appellant's contention therein. The reference in the *Encyclopedia of Pleading and Practice* applies to pleadings at the common law or under codes providing a practice similar thereto, and has no reference to a code such as ours. In the case of *Heebner v. Shepard*, *supra*, a counterclaim was interposed.

There is no merit in the contention that the court erred in allowing the amendment, alleging partnership, "as defendant might have had a counterclaim against said partnership." In our former opinion we suggested that there was no contention or showing that any such counterclaim, in fact, existed. We are now told in the petition for rehearing that the defendant had a counterclaim based upon his right of possession. If such is the case, the right of possession arose subsequently to the original seizure and the original action. In that action it was decided that the plaintiff was not the owner of the notes and mortgage, and therefore not entitled to the possession of the goods. The present action is based upon the original wrongful taking. A subsequent right of possession which is based upon a subsequent purchase of the notes and mortgage or a subsequent right of possession therein is not "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." See § 6860, Rev. Codes 1905. Such being the case, it is not, under the Code, a fit subject for counterclaim. The subject of the present action is the original right of possession and the original wrongful taking, and not a title or right of possession acquired subsequently thereto.

The petition for a rehearing is denied.

FARMERS' MERCANTILE COMPANY v. NORTHERN PACIFIC RAILWAY COMPANY.

(146 N. W. 550.)

Gross negligence — want of any care — omission — recklessness — duty — fraud.

1. Gross negligence is, to all intents and purposes, no care at all. It is the omission of the care which even the most inattentive and thoughtless seldom fail to take of their own concerns. It evinces a reckless temperament. It is a lack of care which is practically wilful in its nature. It is an omission of duty which is akin to fraud. It is the absence of even slight care.

Evidence — gross negligence — not shown.

2. Evidence examined and *held* not to show gross negligence.

Goods — freight paid — consignee — removal of part — railway company — warehouseman — storage charges — notice to relieve from liability.

3. Where goods have been received and unloaded and the freight thereon paid by the consignee, but part only is actually and physically delivered on account of the fact that the consignee does not have drayage facilities sufficient to remove all, the liability of the railroad company as a warehouseman extends to such portion so left with it, unless at the time of such partial delivery it gives notice to the consignee that it will not insist upon storage charges and will no longer hold possession of the property as a warehouseman.

Goods — depot — warehouse — stove — inflammable matter — care of stove — question of fact for jury.

4. Where goods are placed in a depot or warehouse in a room in proximity to which is a stove which can only be regulated by opening the door, and within 3 and 6 feet of such stove is inflammable matter, it is a question of fact for the jury whether the leaving such door open in order to check the draft and prevent the fire from burning out constitutes lack of ordinary care.

Conflagration — cause of — question for jury — evidence.

5. It is also a question for the jury whether the leaving such door open in the proximity of the inflammable matter was the cause of the conflagration which, it is proved, destroyed the goods, there being no other probable cause disclosed by the evidence.

Plaintiff — evidence — jury satisfied — injury.

6. A plaintiff is not bound to exclude the possibility that an accident might

Note.—The authorities on the right of a carrier to terminate its responsibility as warehouseman are gathered in a note in 9 L.R.A.(N.S.) 577.

have happened in some other way than that contended for by him. He is only required to satisfy the jury by a fair preponderance of his evidence that his injury occurred in the manner he contends for.

Facts — theory — different conclusions — question for jury.

7. If there be shown any facts bearing upon the question of a loss or injury and they afford room for fair-minded men to conclude therefrom that one theory of the case is better supported than the other, the question cannot properly be withdrawn from the jury.

Accident — cause shown — warrantable inference — other causes — absence of proof.

8. A cause being shown which might produce an accident, and it further appearing that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result.

Evidence — uncertainty — injury — different causes — speculation — verdict — specific cause charged — probability — nonsuit — error.

9. Where in such a case the evidence is so uncertain as to leave it equally clear and probable that the injury resulted from any one of a number of causes that might be suggested, then and in that case a verdict for plaintiff would be pure speculation, and could not be sustained; but where the evidence, although circumstantial, is such that it would appear possible that the injury resulted from any one of several causes, and yet it points to the greater probability that it resulted from the specific cause charged by the plaintiff, a nonsuit should not be granted.

Evidence — fair construction — negligence — conclusion.

10. If upon a fair construction that a reasonable man might put upon the evidence, or any inference that might reasonably be drawn therefrom, the conclusion of negligence can be arrived at or justified, then the defendant is not entitled to a nonsuit, but the question of negligence should go to the jury.

Opinion filed March 12, 1914.

Appeal from the District Court of Morton County, *Nichols, J.*

Action for damages for loss of freight by fire. Judgment for defendant. Plaintiff appeals.

Reversed.

Statement by *BRUCE, J.*

This is an action to recover the value of certain merchandise which was destroyed by fire in defendant's warehouse at Mandan on March 8,

1910. Various shipments of merchandise were consigned to defendant by various wholesale houses for delivery to the plaintiff at Mandan, North Dakota. Plaintiff's place of business, however, was situated about 18 or 20 miles from Mandan. The goods arrived at Mandan on the 24th day of February, 1910, and on the 1st and 2d days of March, 1910. On arriving at their destination they were placed in the defendant's warehouse. On the 24th day of February, 1910, plaintiff paid the freight for the goods received upon that day, and on the 3d day of March paid the freight upon the balance of the goods and which reached Mandan on the 1st day of March, 1910, and on the 2d day of March, 1910, respectively. At such time plaintiff was given a receipt for the freight so paid, but whether it itself gave a receipt for the goods is not in evidence. On the 3d day of March, 1910, plaintiff called for the goods with a drayman, but the drayman not having room for all of the freight, a portion thereof was left in defendant's warehouse at Mandan, and said goods were destroyed by fire on March 8, 1910. It was shown in the evidence that the plaintiff was in the habit of hiring its teaming done; that it sent up teams from its place of business at St. Anthony; and that it often happened "that the team could not haul all of the goods, and the balance was left in the freight depot until the team would come up again. This would be three or four days, according to the roads. Only once or twice did we have to pay storage, but as a general rule we did not have to pay storage, and we were not asked to pay storage on the goods in suit. At this time the roads were bad and the teams were slow in coming up." This evidence, as we construe it, shows that no storage was asked for the care of the goods from the time of their arrival, which was on the 24th day of February, 1910, and the 1st and 2d days of March, 1910, and at the time of a removal of a portion on the 3d day of March, 1910, and we may assume that no storage fee was demanded after the fire. The evidence, however, is a little inconclusive as to the terms on which the goods destroyed were left with the defendant after removal of part of the consignment. All of the evidence upon the subject, in addition to that already given, is to be found in the testimony of the secretary and treasurer of the plaintiff corporation, and is as follows: "When I paid the freight I took a receipt for it. Exhibit "A" is one of them. Where there was only one package, and it was delivered, there was a ring placed around the

figure in the column marked 'number of packages,' indicating that the package was delivered. Where there was no ring around it, it was not delivered. The barrel of linseed oil not checked off is the only item on that bill not received. The drayman put on his wagon the other items, and undoubtedly did not have room to take it. He came up and got other goods right along, but did not get around to take this barrel. There might have been other goods that we needed more. Occasionally we specified what he was to bring, but he usually had his own way. In general he had orders to take what came first." Exhibit "A" does not appear to have been offered in evidence. At any rate it is not in the record. It was stipulated that each of the bills of lading issued for the carriage of the goods contained the following provisions: "Property not moved by the party entitled to receive it, within forty-eight hours, exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in a car, depot, or place of delivery of the carrier or warehouse subject to reasonable charge for storage and to the carrier's responsibility as a warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the owner's risk, and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. For loss, damage, or delay caused by fire occurring forty-eight hours, exclusive of legal holidays, after notice of the arrival of the property at destination or at port of export, if intended for export, has been duly sent or given, the carrier's liability shall be that of warehouseman only." There is no evidence as to whether the goods were checked over by the plaintiff or by his drayman. All that the witness testified to is that the freight was paid and a receipt for the money given. There is evidence, however, that certain goods were delivered to the drayman by the defendant, and that a ring was placed around the goods in the column marked "Number of packages" in the bill of lading. The case, therefore, as to the goods which were destroyed is not a case where goods have been physically delivered and afterwards returned for safe-keeping, but where a consignment of goods has been received, a part delivery, and the remainder left without anything being said as to the terms and conditions of leaving.

The facts are practically undisputed which bear upon the commence-

ment and cause of the fire. In the southwest corner of the defendant's depot was a "warming room" where goods which might be injured by freezing were stored. There was a door from the outside into this room. This, however, was kept locked and there was only one window, which was shut. The only door, therefore, by which you could readily get into the "warming room" was in the northeast corner and open from the inside of the freight depot proper. There were two stoves in the room only one of which was used, and this one at this time of the year (March 8) was kept going only at night, as it was not very cold. The stove was of cast iron, belonging to the class known as the Earle Round Stoves, bulged in the middle and such as are usually used in small stations and cabooses. The feed door was in the upper part and the fire box in the lower half. It appears to have had no damper nor drafts, and was regulated by leaving the door open or shut as you wanted to check or stimulate the fire. There was a piece of zinc beneath this stove. The size of the room is not disclosed. It is shown, however, that there was a space of 5 or 6 feet between the stove and the nearest wall; that the room was pretty well filled with merchandise, which was piled in boxes, crates, and barrels around the wall and within 3 feet of the stove at the sides and within about 6 feet in front. One of the witnesses testifies that the bananas came in crates which were lined with burlap, and another that they came in boxes packed with hay. It appears that on the night in question there had been a fire in the stove since 7 o'clock in the evening, and that the door had been kept shut. At 2 o'clock in the morning two employees of the defendant came into the room, and one of them threw a hod of coal on the live coals still remaining in the stove. The two then left, leaving the stove door open, but closing the door between the warming room and the main part of the depot. The amount of coal thrown on the fire was about two shovels full. It was neither hard coal nor soft coal, and was in pretty large chunks. About an hour to an hour and a half after this occurrence, the two men smelled smoke, and, opening the door to the warming room, found dense smoke and flames of fire in and exuding therefrom. One of them went to turn in the fire alarm, and the other took a couple of pails of water from a barrel standing near by, and threw them at random into the room. A night policeman then joined them, and the three took out some hose from a neighboring cart hose, and connected it with the hy-

drant, but as there was no pressure they could not throw any water into the fire. Then the fire department came and coupled on to another hydrant, but did not have enough pressure, and by the time they did get sufficient pressure the fire was out of the warming room, and had burst through the eaves, and was beyond control. The hydrant to which the witnesses attached their hose belonged to the defendant, and the one to which the city fire department attached its hose belonged to the city of Mandan. The water pressure in both instances, however, was furnished by the defendant company.

W. H. Stutsman, for appellant.

A motion to direct a verdict must *specify* the ground upon which it is made. *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747; *Mattoon v. Fremont, E. & M. V. R. Co.* 6 S. D. 196, 60 N. W. 740.

Plaintiff is not bound to exclude the possibility that the accident might have happened in some way other than the way charged; such a holding would be to require him to make proof *beyond a reasonable doubt*. He is only required to satisfy the jury by a preponderance of the evidence. *Lunde v. Cudahy Packing Co.* 139 Iowa, 688, 117 N. W. 1063; *Hopkinson v. Knapp, & S. Co.* 92 Iowa, 328, 60 N. W. 653, 14 Am. Neg. Cas. 568; *Dalton v. Chicago, R. I. & P. R. Co.* 104 Iowa, 26, 73 N. W. 349; *Huggard v. Glucose Sugar Ref. Co.* 132 Iowa, 724, 109 N. W. 475.

Where, from the state of the evidence, there is room for honest, fair-minded men to differ as to the cause of the accident or injury, it is *always* a question for the jury. *Schoepper v. Hancock Chemical Co.* 113 Mich. 582, 71 N. W. 1081; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 150, 8 N. W. 862; *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038, 5 Am. Neg. Rep. 331; *Seattle v. St. Louis & S. F. R. Co.* 127 Mo. 336, 30 S. W. 125.

The question is not what the trial court, or this court, might infer from a given state of facts, but whether the jury, as reasonable, fair men might legitimately conclude from the proof offered, that the accident occurred in the manner alleged by plaintiff. *Mumma v. Easton & A. R. Co.* 73 N. J. L. 653, 65 Atl. 210; *White v. Chicago, M. & St. P. R. Co.* 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146; *Kenney v. Hannibal*

& St. J. R. Co. 80 Mo. 573; Sheldon v. Hudson River R. Co. 14 N. Y. 218, 67 Am. Dec. 155; Rintoul v. New York C. & H. R. R. Co. 17 Fed. 905; Bevis v. Baltimore & O. R. Co. 26 Mo. App. 19; Deming v. Merchants' Cotton-press & Storage Co. 90 Tenn. 307, 13 L.R.A. 518, 17 S. W. 89; Houston v. Brush, 66 Vt. 331, 29 Atl. 380.

The accident would not have happened if someone had not been careless. It is one that would not *ordinarily* happen without the negligence of some one. Kaples v. Orth, 61 Wis. 531, 21 N. W. 633; St. Paul F. & M. Ins. Co. v. Great Northern R. Co. 116 Minn. 397, 133 N. W. 849; Cummings v. National Furnace Co. 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Carroll v. Chicago, B. & N. R. Co. 99 Wis. 399, 75 N. W. 176; Shafer v. Lacock, 168 Pa. 497, 29 L.R.A. 254, 32 Atl. 44; Paulsen v. Modern Woodmen, 21 N. D. 235, 130 N. W. 231; Stevens v. Continental Casualty Co. 12 N. D. 463, 97 N. W. 862; Anthony v. Mercantile Mut. Acci. Asso. 162 Mass. 354, 26 L.R.A. 406, 44 Am. St. Rep. 367, 38 N. E. 973.

On a motion by defendant for a directed verdict, at the close of plaintiff's case, the court will assume the evidence of the plaintiff to be undisputed, and give to it the most favorable construction it will bear. Bohl v. Dell Rapids, 15 S. D. 619, 91 N. W. 315; Richardson v. Swift & Co. 37 C. C. A. 557, 96 Fed. 699; Kansas P. R. Co. v. Richardson, 25 Kan. 391; Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050.

If negligence can be established from any lawful deduction from the evidence, it is error for the court to grant a nonsuit. Vanderwald v. Olsen, 1 N. Y. S. R. 506; Ham v. Lake Shore & M. S. R. Co. 13-23 Ohio C. C. 496; Stephens v. Brooks, 65 Ky. 137.

Watson & Young and E. T. Conny, for respondent.

Where the ground for motion for a directed verdict makes manifest the question of law upon which the case is taken from the jury, and the defects upon which the motion is based do not admit of correction, or could not have been cured had attention been specifically called to them, a failure to so specify will not reverse the ruling. Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Fontana v. Pacific Can. Co. 129 Cal. 51, 61 Pac. 580; Smalley v. Rio Grande Western R. Co. 34 Utah, 423, 93 Pac. 311; Chasse v. Bankers' Reserve Fund L. Ins. Co. 27 S. D. 70, 129 N. W. 571.

It is sufficient if the question is raised in general terms, where the motion is based upon the insufficiency of the evidence to sustain a recovery. 38 Cyc. 1584; *Minnesota Thresher Mfg. Co. v. Lincoln*, 4 N. D. 410, 61 N. W. 145.

The defendant was only a gratuitous bailee—and needed not to employ a watchman to guard the warehouse. *Texas C. R. Co. v. Flanary*, — Tex. Civ. App. —, 50 S. W. 726.

Where a railroad company is acting in good faith, as a mere depositary without pay, it is only required to use slight care, and will be liable for an act of ordinary negligence on the part of its servants. *Brown v. Grand Trunk R. Co.* 54 N. H. 535; *McCombs v. North Carolina R. Co.* 67 N. C. 193; *Kenney Co. v. Atlanta & W. P. R. Co.* 122 Ga. 365, 50 S. E. 132.

The consignee took the risk when it failed to remove the goods and left them to be cared for by the defendant. *Whitney Mfg. Co. v. Richmond & D. R. Co.* 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147.

There is no liability on the common carrier if he does not interfere to cause the injury. 6 Cyc. 464; *Georgia R. & Bkg. Co. v. Thompson*, 86 Ga. 328, 12 S. E. 640; *Neal v. Wilmington & W. R. Co.* 53 N. C. (8 Jones, L.) 482; *Vaughn v. New York, N. H. & H. R. R. Co.* 27 R. I. 235, 61 Atl. 695; *Gregg v. Illinois C. R. Co.* 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343; *South & North Ala. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749; *Whitney Mfg. Co. v. Richmond & D. R. Co.* 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147.

If a bailee for hire, was defendant guilty of negligence proximately causing the loss of the goods in question? A railroad company is only bound to use the same diligence to save freight stored in its warehouse, at its destination, from fire, as it uses to save its own property, where the shipper has been notified that it is held subject to his order and at his risk. *Laporte v. Wells, F. & Co.'s Express*, 23 App. Div. 267, 48 N. Y. Supp. 295; *E. O. Stanard Mill. Co. v. White Line C. Transit Co.* 122 Mo. 258, 26 S. W. 705; *Bennitt v. The Guiding Star*, 53 Fed. 937; *Schmidt v. Blood*, 9 Wend. 268, 24 Am. Dec. 143; *Grieve v. New York C. & H. R. R. Co.* 25 App. Div. 518, 49 N. Y. Supp. 950.

Where the plaintiff alleges that his loss is occasioned by the negligence of defendant, he must *prove* it. *Sheldon v. Hudson River R.*

Co. 29 Barb. 228; Longabaugh v. Virginia City & T. R. Co. 9 Nev. 296; Smith v. Hannibal & St. J. R. Co. 37 Mo. 295; Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L.R.A. 509, 53 N. W. 970; Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481; White v. Chicago, M. & St. P. R. Co. 1 S. D. 330, 9 L.R.A. 824, 47 N. W. 146; Balding v. Andrews, 12 N. D. 277, 96 N. W. 305, 14 Am. Neg. Rep. 615; Claffin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Schmidt v. Blood, 24 Am. Dec. 153, note.

BRUCE, J. (after stating the facts as above). We are satisfied that if the defendant occupied the position of a gratuitous bailee merely, it was in no way liable in this case. If it was such a bailee, it could only have been held liable upon proof of gross negligence, and no such proof is to be found in the record. Gross negligence is, to all intents and purposes, no care at all. It is the omission of the care which even the most inattentive and thoughtless seldom fail to take of their own concerns. It evinces a reckless temperament. It is a lack of care which is practically wilful in its nature. It is an omission of duty which is akin to fraud. It is the absence of even slight care. We find no proof of any such gross negligence in the case at bar.

The defendant, however, was not, as we view the evidence, a gratuitous bailee. It was a warehouseman; that is to say, a bailee for hire. As such it owed a duty of the exercise of reasonable or ordinary care. It is true that the journey was over, the freight paid, and that a part of the goods were delivered. The defendant, however, still retained the remainder, and had the right to charge storage therefor, both under the terms of the bill of lading, the statute, and the common law. This really is the test of the relationship; for it would never do to allow a bailee to act under a one-sided option, and to claim and to insist upon the relationship of a gratuitous bailee if the goods were lost or destroyed while in his custody, but to claim that of a bailee for hire if, when a delivery was demanded, he was able to produce the goods. Gray v. Missouri River Packet Co. 64 Mo. 47; McClain, Cases on Carriers, 21; Brunson v. Atlantic Coast Line R. Co. 76 S. C. 9, 9 L.R.A.(N.S.) 577, 56 S. E. 538. For a long time a decision upon the question directly at issue was avoided by the courts, though they seemed to lean towards the conclusions now reached by us. See Texas C. R.

Co. v. Flanary, — Tex. Civ. App. —, 50 S. W. 727. In the year 1900, however, the supreme court of Wisconsin indignantly dismissed the idea that the relationship of a gratuitous bailee merely existed, and as one that was hardly worthy of consideration. See *Whitney v. Chicago & N. W. R. Co.* 27 Wis. 327. In 1907 the rule was clearly laid down by the supreme court of South Carolina in a case almost identical in its facts to the one at bar. The court said: "The main question in the case is whether the undisputed testimony showed a delivery to the plaintiffs. As the fire occurred while the flour was in defendant's depot, and therefore in its actual possession, it sustained to the plaintiffs either the relation of common carrier, warehouseman, or gratuitous bailee. When goods transported by a railroad company arrived at their destination, its liability as a common carrier continues until the consignee has a reasonable time within which to remove them. But, even after the lapse of a reasonable time after its liability as a common carrier has ceased to exist, it is nevertheless liable by operation of law, as a warehouseman, although the goods may not have been unloaded and deposited in a warehouse used for storing freight, technically termed a warehouse. *Spears v. Spartansburg, U. & C. R. Co.* 11 S. C. 158; *Bristow v. Atlantic Coast Line R. Co.* 72 S. C. 43, 51 S. E. 529. Until a reasonable time has elapsed after arrival, the common carrier is practically liable as an insurer; but after that time it is only bound as a warehouseman to exercise ordinary care. As a warehouseman the railroad company has the right to exact storage charges as long as such relation exists in the particular case, and, until it ceases to be a warehouseman, its liability for ordinary negligence continues. *The fact that it has the right as a warehouseman to collect storage charges makes it a bailee for hire, and prevents it from claiming that it was merely a gratuitous bailee, at least before it gives notice that it will not insist upon such charges, and will not longer hold possession of the property as a warehouseman*, which the testimony does not show was done in this case. Therefore the defendant was not a gratuitous bailee, and must necessarily sustain to the plaintiffs either the relation of common carrier or warehouseman." *Brunson v. Atlantic Coast Line R. Co.* 76 S. C. 9, 9 L.R.A.(N.S.) 577, 56 S. E. 538.

Again in the case of *Tarbell v. Royal Exch. Shipping Co.* 110 N.

Y. 182, 6 Am. St. Rep. 350, 17 N. E. 721, we find the following: "Although a consignee may neglect to accept or receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury. The law enables him to wholly exempt himself from responsibility in such a contingency by giving him the right to warehouse the goods. When this is done, he is no longer liable in any respect, and if they are subsequently lost by the negligence of the warehouseman, the carrier is not liable. *Redmond v. Liverpool, N. Y. & P. S. B. Co.* 46 N. Y. 578, 7 Am. Rep. 390, and cases cited. But so long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as carrier, there supervenes upon the original contract of carriage by implication of law a duty as bailee or warehouseman to take ordinary care of the property."

In this case 63 slabs of tin were received at the port of New York. Notice was given to the consignees, who obtained a permit at the custom house for its discharge. Two days later they paid the freight, and obtained an order for the delivery of the tin, addressed to the clerk of the steamer on which it had been shipped. They left the order on the same day with the clerk, indorsed, "Deliver to our order only." On the same day the tin was discharged from the vessel. On the next day a weigher, sent by the assignees to defendant's wharf, weighed the tin and divided it into 5-ton lots. Three days later it was found that sixty-three slabs were missing; but there was nothing to show when or by whom they had been taken. The court found that the part of the wharf where the tin lay was the private wharf of the defendant. It was covered with a substantial building the doors of which were locked at night. Two watchmen were employed by the defendant to watch the wharf by day and four by night, and due care had been taken in their selection. There was also a competent person in the employ of the defendant to keep tally of the cargo taken away by merchants, and to take receipts for it. The trial court found for the plaintiff, and upon appeal the judgment was affirmed. The court, in passing upon the question, held that "under the circumstances, the defendant, under the authorities, must be held to have made delivery of the tin under its contract as carrier, and to have discharged itself from its custody as such." It, however, proceeded as follows: "There can

be no doubt, we suppose, that in many cases a carrier's whole duty in respect to goods carried by him is not discharged by a constructive delivery terminating his strict responsibility as carrier. Although a consignee may neglect to accept or receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury. The law enables him to wholly exempt himself from responsibility in such a contingency by giving him the right to warehouse his goods. When this is done, he is no longer liable in any respect, and if they are subsequently lost by the negligence of the warehouseman, the carrier is not liable. *Redmond v. Liverpool, N. Y. & P. S. B. Co. supra*, and cases cited. But so long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as carrier, there supervenes upon the original contract of carriage by implication of law a duty as bailee or warehouseman to take ordinary care of the property. This duty of ordinary care rested upon the defendant in this case. The tin, it is true, was placed by the act of the defendant under the dominion of the consignee for the purposes of weighing and removal; but nevertheless, as between the defendant and their assignees, the actual custody of the part not removed by the consignees or their assignees remained at all times in the defendant. It was deposited on its private wharf, to which alone it, its servants, and those permitted by it, had access. The tin could not have been removed against their consent. It was, in fact, removed by someone unknown, by their tacit acquiescence, doubtless without any fraud on their part, but nevertheless its removal by a stranger was made possible by reason of an omission on the part of the defendant's servants to take the precautions against misdelivery which the defendant had deemed it proper to prescribe to prevent such an occurrence. The trial court found that the omission to take these precautions was negligence. We do not perceive why this finding is not supported by evidence. If there was negligence on the part of the servants of the defendants which occasioned or contributed to the loss, the doctrine of *respondeat superior* applies, and makes it in law the negligence of the defendant. The delay of the consignees in removing the tin had no legal connection with this breach of duty by the defendant, and cannot justly be considered as a concurring cause of the loss."

We find no cases which hold to a contrary doctrine, with perhaps the exception of *Brown v. Grand Trunk R. Co.* 54 N. H. 535. We have carefully examined the authorities presented by counsel for respondent, but find that although in them the carrier was exempted from liability, the evidence disclosed that a delivery had in fact been made, and that the carrier had no longer any custody or control over the goods or any duty to perform. Most of them are what might be called carload cases in which the freight had been paid, the goods or cars receipted for, and the cars switched upon side tracks or spurs of the consignees. Delivery in fact had been made, though the goods remained in the cars of the railroad company, the custody was in the consignees; the cars, as it were, being bailed to the consignees, rather than the wheat or cotton contained therein being bailed to the carrier. Such cases are: *Vaughn v. New York, N. H. & H. R. R. Co.* 27 R. I. 235, 61 Atl. 695; *Whitney Mfg. Co. v. Richmond*, 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147; *Kenney Co. v. Atlanta & W. P. R. Co.* 122 Ga. 365, 50 S. E. 132; *Texas C. R. Co. v. Flanary*, — Tex. Civ. App. —, 50 S. W. 727.

The cases of *Neal v. Wilmington & W. R. Co.* 53 N. C. (8 Jones, L.) 482, is a case in which the liability of a warehouseman or bailee for hire is alone fixed or considered, and in which the point under consideration in the case at bar is not mentioned. The same is true of the case of *Gregg v. Illinois C. R. Co.* 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343.

In the case of *New Albany & S. R. Co. v. Campbell*, 12 Ind. 55, the goods were placed upon the platform for delivery, and no arrangements were made for their future custody, and they were there burned. There was no evidence whatever from which any negligence contributing to the fire, or occasioning the fire, could be imputed to the railway company.

In the case of *Chalk v. Charlotte, C. & A. R. Co.* 85 N. C. 423, the goods were placed upon the platform for delivery, the freight charges were paid, and no intimation seems to have been given that there was a desire that they should be retained. The consignee delayed on account of an inability to secure the services of a city drayman. The fire, too, seems to have been occasioned by a third party, for whose negligence the court held the company was not liable.

In the case at bar there is no proof of any delivery to the consignees of the articles which were destroyed. The testimony is, in fact, that when the plaintiff's secretary and treasurer "paid the freight, he took a receipt for it. Where there was only one package and it was delivered, there was a ring placed around the figure in the column marked 'Number of Packages,' indicating that the package was delivered. *Where there was no ring around it, it was not delivered.* The barrel of linseed oil not checked off is the only item on that bill not received. The drayman put on his wagon all the other items, and undoubtedly did not have room to take it. He came up and got other goods right along, but did not get around to take this barrel. There might have been other goods that we needed more. Occasionally we specified what he was to bring, but he usually had his own way. In general he had orders to take what came first." To hold, indeed, in this case that the defendant was a gratuitous bailee merely, would be to hold that in all such cases no storage can be charged, and that consignees can impose upon the accommodations and good nature of the carrier indefinitely. Such a holding might be advantageous to the defendant in this particular lawsuit. We hardly believe, however, that it would advantage it permanently and as a general rule of business, or that the real interests of either carriers or shippers would be subserved thereby.

In the case at bar, also, there is no proof of any notice being given that no charges would be insisted upon. There is, on the other hand, proof that storage charges had occasionally been demanded in the past under similar circumstances. It certainly would have been within the power and the right of the defendant company to have demanded them if the goods had not been destroyed and had been called for some days later. The law will not allow a bailee or warehouseman in such a case to keep his intentions locked in his own breast. It is true that the evidence shows that no charges were demanded, but all we can infer from this is that no storage fees were demanded up to the time of the partial delivery, and none after the fire. There is no evidence of anything being said as to the charges on the goods retained, when they were retained, or any waiver of the right to charge therefor. Under the authorities the defendant was a bailee for hire.

We, too, concede that a bailor "seeking to recover from a warehouseman for the nondelivery of goods or an injury thereto must prove

negligence. When he shows that the goods were not delivered on demand or were delivered in damaged condition, he has made a prima facie case. If the defendant accounts for the nondelivery or injury by showing that the goods were stolen or were lost or damaged by fire, or in any other manner not inconsistent with the exercise of ordinary care on his part, the plaintiff's prima facie case is overcome, and he must prove positive negligence occasioning the loss." See *Schmidt v. Blood*, Wend. 268, 24 Am. Dec. 153. In the case at bar, however, as before suggested, the proof shows not only the loss by fire, but the fact of an open stove in the proximity of inflammable matter, and as to whether or not this was negligence, and the cause of the conflagration, are, we believe, questions for the jury to decide.

The case of *Bennitt v. The Guiding Star*, 53 Fed. 937, cited by counsel for respondent, is not in point. In this case there was no proof whatever as to how the fire originated, or any explanation therefor.

The defendant then was a bailee for hire, and owed the duty of ordinary care. Whether this was exercised or not was, under the evidence, a question for the jury, and not for the court, to decide. The leaving of the door of the stove open, and its proximity to inflammable matter, were not merely possible, but highly probable, causes of the accident. Whether they were the causes or not was for a jury to decide. A plaintiff "is not bound to exclude the possibility that the accident might have happened in some other way, for that would be to require him to make his case beyond a reasonable doubt. He is only required to satisfy the jury by a fair preponderance of the evidence that the injury occurred in the manner he contends it did." *Lunde v. Cudahy Packing Co.* 139 Iowa, 688, 117 N. W. 1063; *Hopkinson v. Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653, 14 Am. Neg. Cas. 568; *Dalton v. Chicago, R. I. & P. R. Co.* 104 Iowa, 26, 73 N. W. 349; *Huggard v. Glucose Sugar Ref. Co.* 132 Iowa, 724, 109 N. W. 475. "If there be shown any facts bearing upon the question, and they afford room for fair-minded men to conclude therefrom that one theory of the case is better supported than the other, the question cannot properly be withdrawn from the jury. . . . A cause being shown which might produce an accident, and it further appearing that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known

was the operative agency in bringing about such result." *Mumma v. Easton & A. R. Co.* 73 N. J. L. 653, 65 Atl. 210; *Schoepper v. Hancock Chemical Co.* 113 Mich. 582, 71 N. W. 1081; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 150, 8 N. W. 862; *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038, 5 Am. Neg. Rep. 331; *Seattle v. St. Louis & S. F. R. Co.* 127 Mo. 336, 30 S. W. 125; *Kenney v. Hannibal & St. J. R. Co.* 80 Mo. 573; *Sheldon v. Hudson River R. Co.* 14 N. Y. 218, 67 Am. Dec. 155.

The rule of probabilities has, perhaps, been as clearly stated by the supreme court of Idaho in the case of *Adams v. Bunker Hill & S. Min. Co.* 12 Idaho, 637, 11 L.R.A.(N.S.) 844, 89 Pac. 624, as in any other case. "Where the evidence in a personal injury case," the court says, "is so uncertain as to leave it equally clear and probable that the injury resulted from any one of a number of causes that might be suggested, then and in that case a verdict for plaintiff would be pure speculation, and could not be sustained; but where the evidence, although circumstantial, is such that it would appear possible that the injury resulted from any one of several causes, and yet it points to the greater probability that it resulted from the specific cause charged by the plaintiff, a nonsuit should not be granted. In the latter case the jury would be justified in returning a verdict in favor of the plaintiff, although it be possible that the injury may have resulted from some other cause. The law does not anticipate or attempt to exclude mere possibilities. If upon any fair construction that a reasonable man might put upon the evidence, or any inference that might reasonably be drawn therefrom, the conclusion of negligence can be arrived at or justified, then the defendant is not entitled to a nonsuit, but the question of negligence should go to the jury." See also *Rober v. Northerr P. R. Co.* 25 N. D. 394, 142 N. W. 22. In the case at bar not merely was the leaving of the stove door open and the proximity of that stove to the freight a possible and probable cause of the conflagration, but it is the only one that is hinted at in the evidence.

The same considerations apply to the question whether the leaving of the stove door open and in the proximity of the more or less inflammable freight constituted a lack of ordinary care. Questions of negligence are primarily for the jury. The general rule is that if there is evidence tending fairly to show actual negligence on the part

of the defendant or even scant or slight evidence, if it is admitted without objection, the case should be submitted to the jury if it might be reasonably and properly concluded that there was negligence. A case should not be withdrawn from the jury when a recovery can be had on a view that can reasonably be taken of the facts which the evidence tends to show, and the fact that the defendant offers strong evidence showing that the plaintiff must be mistaken in his version of the accident will not justify the court in taking the case from the jury. The question of negligence, indeed, whether it be of a defendant or the alleged contributory negligence of a plaintiff, is primarily and generally a question of fact for the jury. It becomes one of law, and is withdrawable from the jury only when but one conclusion can be drawn from the undisputed facts. If the undisputed facts are of such a nature that reasonable men might draw different conclusions or deductions therefrom, then the question of negligence must be submitted to the jury. *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; *Thomp. Neg.* §§ 3790, 3791; *Kunkle v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 367, 121 N. W. 830; *Rober v. Northern P. R. Co.* 25 N. D. 394, 142 N. W. 22.

We are satisfied that there is no proof of gross negligence in this case. Whether or not there was a lack of ordinary care, however, and whether that lack was the proximate cause of the conflagration, are, we believe, matters upon which reasonable men might differ. Such being the fact, the case should have been submitted to the jury.

The judgment of the District Court is reversed and the cause remanded for further proceedings according to law.

**FARMERS BANK OF MERCER COUNTY, a Corporation, v.
JACOB RIEDLINGER.**

(146 N. W. 556.)

**Promissory note — indorsee — action by — evidence — note — duly indorsed
— put in evidence — indorsement not in issue — prima facie case — due
course — innocent purchaser — maturity.**

1. In an action by an indorsee upon a promissory note the production of the

Note.—On the question whether the holder of a bill or note as collateral security is a bona fide holder, see note in 31 L.R.A. (N.S.) 287.

note in court duly indorsed, the indorsement not being put in issue by the answer, a prima facie case that the indorsee acquired title thereto in due course of business is made, and in the absence of any contrary showing, no further evidence is necessary to show that the plaintiff was an innocent purchaser before maturity.

Negotiable promissory note — holder — collateral — duly indorsed before maturity — action.

2. The holder of a negotiable promissory note, duly indorsed before maturity, as collateral to the note of a third party, may maintain an action thereon.

Holder — notice to make — in his hands for collection — immaterial — words — for collection.

3. The fact that the holder of a negotiable promissory note in due course notified the maker thereof that it was in its hands for collection, rather than as collateral, is immaterial, especially where it is shown by the evidence that the use of the words "for collection" was an inadvertence.

Principal note — collection — failure to enforce — suit on collateral — no defense.

4. The failure to enforce or attempt to enforce collection of a principal note before bringing suit upon collateral when due is no defense to an action upon the collateral by the holder thereof.

Opinion filed March 13, 1914.

Appeal from a judgment of the District Court of Sheridan County,
Honorable W. H. Winchester, J.

Reversed.

Thorstein Hyland, for appellant.

The offer in evidence by the plaintiff, holder of a negotiable promissory note, duly indorsed, where the indorsement is not in issue, made a prima facie case, the presumption being that plaintiff acquired same in due course, before maturity. Rev. Codes 1905, § 6361; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20.

It is immaterial whether the same was purchased outright or held as collateral. Second Nat. Bank v. Werner, 19 N. D. 485, 126 N. W. 100; Monett State Bank v. Eubanks, 124 Mo. App. 499, 101 S. W. 687; Brown v. James, 80 Neb. 475, 114 N. W. 591; Galliher v. Galliher, 10 Lea, 29; Martin v. German American Nat. Bank, — Tex. Civ. App. —, 102 S. W. 131; Belanger v. Roberts, Rap. Jud. Quebec, 21 C. S. 518.

SPALDING, Ch. J. This action was brought to recover upon a promissory note for \$600, given by the respondent to one Carl Semmler, dated June 13, 1911, due and payable five months after date. The complaint is in the usual form, and alleges that on or about the 14th day of June, 1911, said Semmler indorsed said note, that the plaintiff is the owner by purchase in the usual course of business, in good faith and for value. The answer admits the execution and delivery of the note, but denies that plaintiff is a good-faith purchaser or for value, and alleges that it is now, and at all times has been, the property of Carl Semmler.

After both parties had rested, the defendant moved the court to direct the jury to return a verdict in his favor, dismissing the case upon the ground that the evidence showed that plaintiff was not the owner of the note, but that it took it as collateral security, and that the plaintiff had failed to establish that, prior to the commencement of the action, it had exhausted its rights against the maker of the note, and could not recover from him. This motion was granted, and the action dismissed, and judgment entered accordingly. From the denial of a motion for a new trial and the judgment, plaintiff appeals.

We shall not consider the assignments of error in detail, but only refer to those which center around the motion for a directed verdict. The propositions of law are simple and elementary, and it would appear from the fact that no appearance has been made in this court by respondent, that he has so concluded.

The plaintiff offered in evidence the promissory note the making and delivery of which was admitted by the answer. The note showed a blank indorsement by the payee, Semmler. This indorsement was not negatived by the pleadings, and, when the note was offered, defendant objected to receiving it in evidence on the ground that no proper foundation had been laid, and because the indorsement was not dated, and did not show when the note was transferred. The court sustained this objection, and an exception was entered.

By producing the note in court, duly indorsed, indorsement not being traversed by the answer, plaintiff established *prima facie* that it acquired title thereto in due course of business. The statutory presumption was in force, and it was not necessary to offer evidence of the fact that the plaintiff was an innocent purchaser before maturity. Rev.

Codes 1905, § 6361; *Shepard v. Hanson*, 9 N. D. 249, 83 N. W. 20; *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614.

On the rejection of the evidence offered, plaintiff placed upon the witness stand its cashier, who testified that the note in suit was taken as collateral to a note made by Semmler to the plaintiff on the 14th day of June, 1911, that the note from Semmler was given for a loan of \$375.

That the holder of collateral, under such circumstances, may maintain an action on the collateral, is too elementary to be questioned. Rev. Codes 1905, § 6353. In this case it is immaterial whether he was a holder in due course, because no defense was attempted on the merits as against the note itself, but, under the terms of the negotiable instruments law, the bank was unquestionably the holder in due course. See Rev. Codes 1905, § 6354; *Dan. Neg. Inst.* 6th ed. § 824.

It developed on the trial that the cashier of the plaintiff had demanded payment of defendant, and, in his letter making the demand, had stated that the note was in the bank's hands for collection, and from the record it would seem as though the trial court had taken this into consideration in passing upon the motion for a directed verdict. The situation was fully explained by the cashier. There was no conflict in the evidence, the defendant submitting no testimony, and, if material, it was apparent that the use of the term "for collection" was an inadvertence. It does not in any manner, therefore, affect the issues. *Second Nat. Bank v. Werner*, 19 N. D. 485, 126 N. W. 100; *Bank of Baraboo v. Laird*, 150 Wis. 243, 136 N. W. 603; *Seybold v. Grand Forks Bank*, 5 N. D. 460, 67 N. W. 682.

As to the failure of an attempt to enforce the collection of the principal note against Semmler before suing upon the collateral, there is no question that no such obligation rested upon the appellant. On the contrary he was authorized to hold and collect collateral as it fell due, and apply the money to the payment of the principal debt. Rev. Codes 1905, § 6213; 1 *Dan. Neg. Inst.* 6th ed. § 833, and authorities cited. Plaintiff did not make any motion for a directed verdict, or for judgment notwithstanding the verdict. Hence, the order of this court must be that the judgment and order of the District Court be reversed and a new trial granted.

27 N. D.—21.

T. R. HOCKSPRUNG v. ROSE B. YOUNG et al.

(146 N. W. 547.)

Pleading — liberally construed — substantial justice— “power of attorney” — statute — compliance with.

1. Plaintiff brought an action to foreclose a real estate mortgage. The complaint was in the usual form. In attempting to allege in the complaint that the mortgagee had executed and delivered to the attorney foreclosing the mortgage a power of attorney, authorizing him to foreclose, in accordance with the provisions of § 7455, Rev. Codes 1905, which reads: “It shall be unlawful for any agent or attorney of any mortgagee, assignee, person or persons, firm, corporation, executor, administrator, trustee, or guardian, owning or controlling any real estate mortgage to foreclose the same until he shall receive a power of attorney from such mortgagee, assignee, person or persons, firm, corporation, executor, administrator, trustee, or guardian, authorizing such foreclosure, and in foreclosure proceedings by action the possession of such power of attorney shall be alleged in the complaint,” it was alleged: “That prior to the commencement of this action plaintiff executed and delivered to R. H. Grace, an attorney at law, of the city of Mohall, North Dakota, duly authorizing and empowering him to take all proceedings necessary for the foreclosure of plaintiff’s said mortgage and the collection of plaintiff’s said debt and to commence and maintain this action.” *Held*: (a) That, under the provisions of § 6869, Rev. Codes 1905, the pleading should be construed liberally, with a view to substantial justice between the parties; (b) that this case in a marked degree calls for the application of such rule, particularly as the attention of neither the court nor the plaintiff was called to the omission of the words, “power of attorney,” which could readily have been supplied by amendment on the trial; (c) that such allegation, notwithstanding the omission of the words, “power of attorney,” is a sufficient compliance with the statute referred to, as it contains enough to fully apprise the defendant that the attorney possessed such power of attorney.

Power of attorney — statute — object of — authority from the holder of mortgage — mortgagee — present in court — supports the foreclosure — proof that attorney was authorized — requirements of statute — complied with.

2. The object of requiring the delivery of a power of attorney by the mortgagee to counsel, authorizing him to foreclose, is to prevent the foreclosure of mortgages by attorneys or negotiators who do not possess authority from the holder, and on a general denial, where the possession of such power of attorney is alleged in the complaint, the fact that the mortgagee is present in court and testifies fully in support of the foreclosure action is conclusive

proof that the attorney was authorized to maintain and conduct the proceedings, and thereby all the essential requirements of the statute and the reasons there for were met.

Second cause of action — damages — instalment — payment out of crop — liquidated damages.

3. In such action, a second cause of action was attempted to be set forth in the complaint, praying for damages in the sum of \$500 by reason of the failure of the mortgagee to pay the first instalment due on the mortgage out of a certain crop. This claim was founded upon a contract between the parties, made at the time the mortgage was executed, whereby the mortgagee had agreed to pay as liquidated damages said sum, in case he failed to pay the notes secured by the mortgage out of the crop raised from year to year on the mortgaged land. *Held*, that plaintiff cannot recover on such contract, for reasons set forth in the opinion.

Opinion filed March 13, 1914.

This is an appeal from the judgment of the District Court of Renville County, *Honorable K. E. Leighton J.*

Affirmed in part and reversed in part.

Grace & Bryans, for appellant.

As to the first cause of action, there being no objection to the sufficiency of the complaint on any grounds, the complaint states facts constituting a cause of action, and should be liberally construed in favor of the plaintiff, even though objection to the introduction of evidence had been made. *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057; *Schweinber v. Great Western Elevator Co.* 9 N. D. 113, 81 N. W. 35; *Chilson v. Bank of Fairmount*, 9 N. D. 96, 81 N. W. 33; *James River Nat. Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7; *Weber v. Lewis*, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; 31 Cyc. 729; 2 Cyc. 689, 691.

As to the second cause of action for damages, this is admitted. 13 Cyc. 90 B, 98 H, 182 D, 192 B.

Swenson & Rodsater, Greenleaf, Bradford, & Nash, for respondent.

In mortgage-foreclosure proceedings a power of attorney from the holder of the mortgage is necessary, and the fact that one was given must be set forth in the complaint. Rev. Codes 1905, § 7455; 1 Estes, Code Pl. p. 190; *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

From a failure to aver material facts in a verified complaint, it

must be construed as implying that they do not exist. *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835.

It is a general rule that the doctrine of liquidated damages does not apply to contracts for the payment of money alone; in such cases courts construe the damages as a *penalty*. 13 Cyc. 101; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Graham v. Bickham*, 4 Dall. 149, 1 L. ed. 778, 1 Am. Dec. 331.

SPALDING, Ch. J. The complaint in this action contains two counts. The first is in the usual form for the foreclosure of a real estate mortgage. No demurrer was interposed or motion made calling attention to any defect therein, and the allegations of the answer need not be considered further than that, as applicable to the point presented on this appeal, they are a general denial.

On the offer of evidence on the part of the plaintiff, no objection was made to the introduction of evidence in support of the first count, but after the trial the court made a finding, among others, that no evidence "was offered or introduced showing or tending to show that the plaintiff had executed or delivered to R. H. Grace or W. E. Bryans, or either of them, or to any person, a power of attorney to foreclose said mortgage, or the possession of such power of attorney by either or any of said persons," and, as a conclusion of law, held that by reason of the fact so found the complaint did not state facts sufficient to constitute a cause of action as to the first cause, and that the action should be dismissed for the defective pleading and proof aforesaid.

This raises the question as to the effect under the circumstances of this case of the provisions of § 7455, Rev. Codes 1905, which is: "It shall be unlawful for any agent or attorney of any mortgagee, assignee, person or persons, firm, corporation, executor, administrator, trustee, or guardian, owning or controlling any real estate mortgage to foreclose the same until he shall receive a power of attorney from such mortgagee, assignee, person or persons, firm, corporation, executor, administrator, trustee or guardian, authorizing such foreclosure, and in foreclosure proceedings by action the possession of such power of attorney shall be alleged in the complaint." The plaintiff attempted to comply with the requirement of this section, and ¶ 6 of his complaint reads as follows: "That, prior to the commencement of this action, plaintiff

executed and delivered to R. H. Grace, an attorney at law, of the city of Mohall, North Dakota, duly authorizing and empowering him to take all proceedings necessary for the foreclosure of plaintiff's said mortgage and the collection of plaintiff's said debt, and to commence and maintain this action." The sole imperfection claimed in this paragraph of the complaint is that it omits the words, "power of attorney," between "N. D." and the word "duly." This omission was undoubtedly a mistake in transcribing. Is it fatal to the pleading? Under § 6869, Rev. Codes, 1905, we are required to construe the pleading liberally with a view to substantial justice between the parties, and if there can ever be an instance which calls for the application of the rule of liberality in the construction of a pleading, it would seem to be presented here. Had any method been pursued by the defendant which would have called the attention of the plaintiff to the omission, it could have been supplied on the trial, and unquestionably would have been so supplied; but the error seems to have been either overlooked or carefully concealed until the court made its findings. No step was taken or act done in any manner calling the attention of the plaintiff to this mistake. Applying the statutory rule, we are satisfied that, without the words, "power of attorney," the pleading was sufficiently complete to comply with the requirements of § 7455, and that no person, of any ordinary degree of intelligence, knowing of the requirement of the statute as to pleading the power of attorney, could read ¶ 6 of the complaint and fail to understand what the pleader had attempted to state therein.

It states that the plaintiff had executed and delivered to Grace, an attorney at law, something which is not named, but which is described as duly authorizing and empowering him to take all necessary proceedings for the foreclosure of the mortgage in question and the collection of the debt secured, and to commence and maintain this action; and this, while not a perfect statement of the facts attempted to be stated, is sufficient to apprise the defendant of the fact of the possession of the power of attorney; and in the absence of a demurrer, any motion or objection apprising the plaintiff of the omission must be held sufficient. To hold otherwise would be in fact defeating justice on the flimsiest kind of a technicality.

The respondent next calls attention to the fact that it was necessary

under the pleadings to offer proof of the possession of such power of attorney. We shall not stop to consider the merits of this contention under the pleadings, but shall examine it briefly with reference to the object of the provision. It is well known to the legal profession that § 7455, above, was enacted to remedy certain abuses in the foreclosure of real estate mortgages in this state quite prevalent prior to its enactment. Numerous persons and corporations were engaged in the negotiation of real estate loans and selling them to capitalists. Frequently the mortgages and notes taken on such loans were guaranteed by the person or corporation negotiating them, when sold. On default in the payment of interest instalments, the negotiator paid them to the assignee and was thereby enabled to maintain his business connections and relations with his moneyed clients. The negotiator retained the coupon usually given for the interest instalments, and so paid by him, and then foreclosed the mortgage, and obtained title to the land on which the security was given without securing possession of the mortgage, and kept the holder of the mortgage in ignorance of the fact that the mortgagee had not paid interest and that the negotiator had acquired title to the premises. This resulted in many cases to the great detriment both of the mortgagor and the assignee of the mortgage. We need not refer to the results at length. It is sufficient to say that the legislature, with a knowledge of these methods and of the resulting injustice, enacted § 7455, *supra*, and also § 7456, with a view to remedying such evils and making certain in all cases that the attorney or negotiator was actually authorized by the holder of the mortgage to make foreclosure.

Having thus indicated the necessity and reason for the enactment, we may inquire whether proof of the possession of the power of attorney has been supplied in the case at bar, or the purpose of the statute fulfilled in another manner. It must be clear that, where the holder of the mortgage, who is the plaintiff, appears in person at the trial and testifies in support of the foreclosure proceeding, the trial court has before it the most convincing and conclusive evidence that a foreclosure by the attorneys conducting the proceedings in court has been authorized by the holder of the mortgage, and thereby all the essential elements intended to be met by literal compliance with the provisions of the statute have been met, that the reason for the requirement is ful-

filled, that in fact, even though the holder of the mortgage gives no direct evidence of the subject of the execution and delivery of the power of attorney, the fact of his testifying in support of the action is as full and adequate proof of his authorizing the attorneys to foreclose as would be his direct testimony that he gave them a power of attorney so authorizing them. In the case at bar the plaintiff was present in person during the trial, and testified that he sold the defendant's land on which the mortgage was given for the purchase price, and as to the execution of the mortgage, nonpayment of the first instalment and of taxes, and as to other matters in issue. The defendant admitted the execution and delivery of the notes and mortgage involved and the nonpayment. It will thus be seen that the reason for the rule contended for has been entirely met. The defendant by appearing and participating in the trial, without calling attention to the absence of direct proof on this subject, has waived it, and the plaintiff has ratified the act of his attorneys, even though there has been no formal power of attorney executed and delivered. Inasmuch as the judgment for the defendants in this case, denying a foreclosure of the mortgage and dismissing the action, rests solely upon the points we have considered, it must be reversed and the court directed to enter a decree of foreclosure.

The second cause of action attempted to be set forth in the complaint is upon a contract entered into between the plaintiff and defendants at the same time that the mortgage referred to in the first cause of action was executed and delivered, and a part of the same transaction. In such contract it was agreed that the mortgagees should pay the notes secured by the mortgage out of the crop raised from year to year on the mortgaged land, and that in case they failed to do so, "there having been no crop failure," they would pay the mortgagee as liquidated damages the sum of \$500. In such contract the mortgagee agreed on his part in the case of crop failure to extend the notes for one year for each crop failure, and if he failed to do so, to pay the mortgagors the sum of \$500 liquidated damages for each and every breach of his agreement. It was sought on the part of the plaintiff to recover the sum of \$500, because the defendants had failed to pay the first note of \$800 out of the proceeds of the crop for the first year, and it was claimed that there had been no crop failure. We do not consider the

evidence on this question, of which there is considerable, as it is clear to us that the provision in this contract, if treated as providing for damages for the failure to pay money, is for damages in excess of the interest, and is therefore in conflict with § 6564, which makes the detriment caused by the breach of obligation to pay money only the amount due by the terms of the obligation, with interest thereon, and if not so treated it is in violation of §§ 5369 and 5370, Rev. Codes 1905, providing that contracts, by which the amount of damages to be paid for the breach of an obligation is determined in anticipation thereof, are to that extent void, except when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. When analyzed, it will be seen that this contract provided a penalty for the nonpayment in a certain manner of the debt covered by the notes and mortgage. The manner of payment was of no importance if the debt was paid. It was wholly immaterial to the mortgagee whether the debt was paid with money derived from the sale of the crop raised on the premises or with other money. If the contract should be construed as in the nature of security, analogous to that of a chattel mortgage upon the crop, it then only secured the payment of the debt, and the plaintiff could not recover both on the contract and on the notes, as, by so doing, he would be recovering twice for the same debt. He has elected to foreclose the mortgage, and, in any event, having done this, he cannot recover upon the contract, if the premises sell for enough to pay his debt.

ASA J. STYLES and Theodore Koffel, Partners, as Styles & Koffel,
v. George H. Dickey and N. G. Meyer, as Sheriff of Pierce County,
North Dakota.

(146 N. W. 546.)

An appeal from taxation of costs, in which \$1 per printed page for abstracts and briefs was taxed as the disbursements of the prevailing party paid therefor.

Appeal — taxation of costs — abstract — brief — disbursements — amount actually paid.

1. The allowance is reduced to 50 cents per page as the amount actually paid for printing.

Court rules — printing of briefs and abstracts — size of page — exclusive of marginal or page numbering.

2. The court rules covering printing require that the printed page shall be 7 inches long by 3½ inches wide of printed matter, exclusive of marginal or page numbering.

Briefs and abstracts — former appeal — deficiency in size — no objection — costs taxed and allowed — exceptions to printed matter must be urged on appeal — waived otherwise — allowance — amount actually paid.

3. Where printed briefs and abstracts were used on the former appeal, and the same were not there excepted to as not having the proper amount per printed page required by the rules, the printed page being undersized; and the court having adjudged on such appeal that the prevailing party printing such briefs should recover costs to be taxed as provided by law,—the trial court properly refused to make allowance for any deficiency in size of the printed page. Where an objection may be made on such grounds on the appeal in which the printed abstracts and briefs are used, any exceptions to any such deficiency in the briefs and abstracts must be urged on that appeal, otherwise the same will be deemed waived and the amount actually paid for the printing should be taxed, regardless of a deficiency in size of the printed pages of briefs and abstracts.

Opinion filed March 14, 1914.

From judgment on an order of the District Court of Pierce County, *Burr, J.*, reviewing taxation of costs, plaintiffs appeal.

Modified as to one item and judgment ordered reduced accordingly, and to avoid retaxation the cost of this appeal are taxed and judgment directed.

Styles & Kaffel, for appellant.

Costs are the creature of the statute, and hence are not allowable in the absence of an express statute permitting such allowance. *Engholm v. Ekrem*, 18 N. D. 196, 119 N. W. 35; *Whitney v. Akin*, 19 N. D. 638, 125 N. W. 470; *Rev. Codes 1905*, § 6754; *Black v. Minneapolis & N. Elevator Co.* 8 N. D. 97, 76 N. W. 984; *Supreme Court Rule 18*, 10 N. D. lii, 91 N. W. xi; 11 Cyc. 743.

Supreme court rule number 35 is not controlling here. *State v. McKnight*, 7 N. D. 446, 75 N. W. 790; *Oliver v. Wilson*, 8 N. D. 593, 73 Am. St. Rep. 784, 80 N. W. 757.

A construction which completely nullifies a plain statutory provision cannot be adopted when the law is susceptible of another construction which is in harmony with the apparent object sought. *State ex rel. Kettle River Quarries Co. v. Duis*, 17 N. D. 319, 116 N. W. 751.

The basis of waiver is estopped—and where there is no estoppel there is no waiver. *Hastings v. Foxworthy*, 60 L.R.A. 233, note; 2 Am. & Eng. Enc. Law, 2d ed. 1091, 1092, 1105; *Clark v. Else*, 21 S. D. 217, 111 N. W. 543; *McVay v. Bridgman*, 17 S. D. 424, 97 N. W. 20.

A. E. Coger and *T. A. Toner*, for respondent Dickey.

In the former appeal the matter of costs and disbursements was settled and fixed, and, in this case, it is *res judicata*, and further, plaintiffs are estopped to raise the question, in this case. *Schmidt v. Beiseker*, 19 N. D. 35, 120 N. W. 1096; *Scottish-American Mortg. Co. v. Reeve*, 7 N. D. 552, 75 N. W. 910; *Bem v. Shoemaker*, 10 S. D. 453, 74 N. W. 239; *Case v. Hoffman*, 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Schmidt v. Wayne Circuit Judge*, 136 Mich. 658, 99 N. W. 877; *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087, 10 Am. Neg. Rep. 520; *Bacon v. Tax Comrs.* 126 Mich. 22, 86 Am. St. Rep. 524, 85 N. W. 307, 34 L.R.A. 323, note; *American Bkg. Co. v. Lynch*, 13 S. D. 34, 82 N. W. 77.

The application must be made to the court rendering the judgment, for a direction as to costs and disbursements. *Wisner v. Field*, 15 N. D. 43, 106 N. W. 38; *McVay v. Tousley*, 20 S. D. 487, 107 N. W. 828; *Schmidt v. Wayne Circuit Judge*, 136 Mich. 658, 99 N. W. 877.

If no such application is made, the clerk must tax the costs, and he has no discretion in the matter. 11 Cyc. 224; *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087, 10 Am. Neg. Rep. 520; *Haseltine v. Mosher*, 51 Wis. 443, 8 N. W. 273; *Fairbank v. Newton*, 48 Wis. 384, 4 N. W. 327; *Clark v. Else*, 21 S. D. 217, 111 N. W. 543; *Clark v. Lawrence County*, 24 S. D. 435, 123 N. W. 868; *McVay v. Tousley*, 20 S. D. 487, 107 N. W. 828; *Kirby v. Western U. Teleg. Co.* 8 S. D. 54, 65 N. W. 482; *Swenson v. Christoferson*, 10 S. D. 342, 73 N. W. 96; *Dalbckermeyer v. Scholtes*, 3 S. D. 183, 52 N. W. 871; *Crane v. Odegard*, 12 N. D. 136, 96 N. W. 326; *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

After a bill of costs and disbursements has been prepared and filed, the burden of showing that any item was excessive or incorrect is upon the appellant. *Hilde v. Nelson*, 19 N. D. 634, 125 N. W. 474; 11 Cyc. 164, 165.

Such questions should be raised before the clerk of court. Not having been so raised, appellant cannot afterwards, and for the first time, raise such question before the district judge on appeal. *Patterson v. Calhoun Circuit Judge*, 144 Mich. 416, 108 N. W. 351; *Sill v. Sill*, 39 Kan. 189, 17 Pac. 665; *Turner v. Scheiber*, 89 Wis. 1, 61 N. W. 280; *Sherman v. Joslin*, 52 Mich. 474, 18 N. W. 224; *State ex rel. Hurley v. Second Judicial Dist. Ct.* 27 Mont. 40, 69 Pac. 244; *State v. Wertzell*, 84 Wis. 344, 54 N. W. 579; *Schmidt v. Wayne Circuit Judge*, 136 Mich. 658, 99 N. W. 877; *Hunter v. Union L. Ins. Co.* 58 Neb. 198, 78 N. W. 516; *Baldwin v. St. Louis, K. & N. W. R. Co.* 75 Iowa, 297, 9 Am. St. Rep. 479, 39 N. W. 507.

The rules of the supreme court are for the convenience of court and counsel and litigants, and the court may suspend its rules, or except a special case from their operation. *People v. Demasters*, 105 Cal. 669, 39 Pac. 35; *Symons v. Bunnell*, 3 Cal. Unrep. 69, 20 Pac. 859.

The statement of the case contains no specifications of error. Therefore, unless error appears on the judgment roll the appeal should be dismissed. *McLaughlin v. Thompson*, 19 N. D. 34, 120 N. W. 554.

Goss, J. This is an appeal from a taxation of costs. Judgment was directed by this court in the decision on the merits in 22 N. D. 515, 134 N. W. 702. The defendants prevailed on that appeal. Their abstract and brief contained 299 printed pages, for which, in the entry of final judgment, the lower court allowed defendants as disbursements \$1 per page. This appeal concerns principally this single item. Appellants contend the cost of said printing was but 50 cents a page, and that the costs taxed on final judgment should be reduced \$149.50. The question arises upon the affidavits considered by the court in reviewing costs taxed. The affidavit of costs and disbursements is in the usual blanket form covering many items, and recites "that the above items of costs and disbursements therein in the district and supreme court are just and correct, and have been or will necessarily be incurred in said action, in behalf of the defendant, or are allowed by law." Plaintiffs' counter affidavit recites that "affiant had a conversation with one of the attorneys for the defendant herein, relative to the printing of said abstract, and said [attorney named] expressly told the affiant that the cost of printing said abstract was only 50 cents

a page," and stating where the printing was done. "That affiant is positive said [attorney] stated and admitted that the same cost only 50 cents a page." This conversation is not squarely denied or explained, the attorney in question stating that "affiant has no recollection of having discussed the matter of the cost of printing the abstract with S. at any time, and believes that had any conversation been had with S. that affiant would recall it. Further, the local printers always quoted to affiant the rate of \$1 a page for printing abstracts and briefs." It is noticeable that the amount actually paid for such printing is not disclosed. Plaintiff's sworn statement that the actual disbursements for said printing were 50 cents a page is not rebutted or explained, and stands as an admission. Opportunity of informing the court of the amount of actual expenditure for that purpose was not availed of. We assume the costs of the printing to have been 50 cents a page, and no more, and allow the reduction of \$149.50 asked for.

Appellants also contend that said abstracts and briefs were not of the size required by the court rules, in that three pages of index and the printed cover of each brief and abstract was included and charged for, making a difference of \$5. This exception is overruled as not well taken.

Appellants except to a printing charge for the full number of printed pages, claiming that none of the printed pages, with two possible exceptions out of the 299 pages, are of the full-page length as required by the rules, but instead are half an inch short in every instance. This arises because the printer has included in the length of the page the page number at the middle of the top of each page, approximately half an inch above the printed matter. Such measurement thereby reduces the solid printed matter of the page two lines per page, or to one half an inch less than required by the rules. Appellant asks that the printing bill be either reduced proportionately, which would reduce the number of printed pages by one fourteenth, or that right to tax any costs for said printing be denied. The rules of this court were formulated to require that "the printed page shall be 7 inches long by $3\frac{1}{2}$ inches wide" of solid printed matter. Rule 18, Supreme Court Rules adopted October 9, 1901, in 10 N. D. lii, 91 N. W. xi, and the recent rules of this court in effect September 1st last, in 23 N. D. xxxv, 141 N. W. vii. (See also rule 37 of the Rules of this court effective April 1, 1914,

145 N. W. xiii.) In measuring the size of the printed page, the page number, as well as the marginal numbering of folios, shall be excluded. The printed page of legal size shall measure 7 inches long by $3\frac{1}{2}$ inches wide of printed matter, exclusive of any numbering. The charge permissible under the old rules of 1901, under which this printing was done, was the amount of disbursements therefor, not exceeding \$1 per page. To avoid confusion in the future, mention is made that under rule 37 of rules effective April 1, 1914, there may be taxed for such a page of printed matter the sum actually paid for such printing, not to exceed 75 cents, including a charge at that rate for the printed cover and index pages. When that appeal was taken the defendants were entitled to charge for the printing of both abstract and briefs. As both were used the necessary and actual disbursements for such printing were properly taxable. We refuse to reduce the printing bill because of any reductions for numbering (though reduction would ordinarily be made) although the printed page is one half an inch short of requirements, for the reason that these appellants had the opportunity on the former trial to except to the briefs and abstract, and direct the attention of the court to such deficiency, and ask that the court make such reduction in its order for judgment. Not having then raised the matter it is now waived. In taxing costs for printing the trial court rightfully assumed that the abstract and briefs as printed were satisfactory, or that this court would have indicated otherwise in its decision disposing of the case and directing the recovery of taxable costs.

Appellants have endeavored to raise one or more matters concluded against them on the former appeal, and which on this appeal we consider determined. The lower court was right in taxing costs in favor of the defendant Dickey only. To set at rest the necessity of taxing costs on this appeal, we hereby tax the costs recoverable by these plaintiffs and appellants, S. & K., of defendant Dickey at 28 pages for printing of their abstract and 14 pages for the printing of their brief, for which we allow 70 cents per printed page, or \$31.50 for printing, together with \$8, the usual fee of the clerk of this court, making a total charge of \$41.50, the costs taxed on this appeal in favor of these appellants. No costs are allowed for argument in this court. The trial court will credit on the judgment of \$497.35 for costs, as of the date of entry, July 1, 1912, the sum of \$149.50, leaving the judgment

for costs as of that date at \$347.85, upon which will be credited, as of the date of the filing therein of the remittitur, the sum of \$41.50, leaving the judgment, after taxing the costs of this appeal, \$306.35, together with accruing interest on \$347.85 from the date of entry of the judgment.

The lower court is directed to enter judgment accordingly.

Fisk, J., did not participate.

EMIL OUSTAD v. CARL HAHN et al.

(146 N. W. 557.)

Copartnership — inventory of property — accounting — exclusion of one partner — equitable relief — personal judgment — other partners — debts of firm — other partners to assume.

Where on May 22d, 1907, two of three copartners wrongfully excluded a third from any and all participation in the business of the concern, and an inventory and accounting was had at such time, and about three years afterwards the excluded partner brought an action for a dissolution of the partnership and for a recovery based upon the inventory of May 22, 1907, and for an accounting since the said inventory and up to the time of the trial, and for general equitable relief, and the defendants failed to furnish such an accounting or to produce the books of the partnership in evidence, *held* that it was not error for the trial court to render a personal judgment against the defendant partners, which was based upon the inventory of the 22d day of May, 1907, and to require the said defendants to assume the debts of said partnership.

Opinion filed March 14, 1914.

Appeal from the District Court of Bottineau County, *K. E. Leighton*, Special Judge.

Action for the dissolution of a partnership and for an accounting. Judgment for plaintiff. Defendants appeal.

Modified.

Note.—The general question of assumption of debts on dissolution of partnership is the subject of notes in 25 L.R.A. 274; 9 L.R.A.(N.S.) 49, and 48 L.R.A.(N.S.) 547.

Statement by BRUCE, J.

This is an action for the dissolution of a partnership and for an accounting; the complaint setting up, among other things, an inventory taken by the partners on the 22d day of May, 1907, and praying for a dissolution of the partnership; that the plaintiff be required to pay the sum of \$2,293.55 and interest thereon as and for the plaintiff's interest in said copartnership, on the 22d day of May, 1907, less \$7.41, and less the sum of \$14.42 balance credit received since May 22, 1907; and that the defendants be required to account to this plaintiff for his share of any and all profits made by this copartnership since the 22d day of May, 1907, and up to the entry of judgment; and for further relief as equity may require. The answer denies that any sum is due to the plaintiff; alleges that he failed to contribute equally with the defendants and failed to keep correct books and to keep his part of the agreement; admits that the plaintiff had loaned \$919.40 to the business; alleges that the business was conducted by the plaintiff at a loss; and that the plaintiff never performed his part of the agreement; and that by reason of such failure no partnership ever existed; and prays for a dismissal of the action. The complaint was dated the 5th day of April, 1910, and the hearing was had on the same date. The judgment was rendered on the 2d day of January, 1912.

The findings of the trial court were that "from the 31st day of October, 1905, until the 22d day of May, 1907, continuously, the plaintiff and the defendants were copartners, engaged in the general mercantile business at Gardena, in the county of Bottineau and state of North Dakota, under the firm name of Hahn Brothers & Oustad, and that the sole and only partners in said copartnership were the defendants and the plaintiff, and that each and all were general partners, entitled to share equally in the profits and to bear equally the losses of the said business; that on the 22d day of May, 1907, the said defendants, without the consent of the plaintiff, excluded the said plaintiff from the said business, and ever since have been in the possession of all the property of the said copartnership; that the plaintiff contributed to the said partnership in the sum of \$919.40, and withdrew from time to time from the said business merchandise and money amounting to the sum of \$574.34; that the defendant Fred Hahn contributed to the capital of the said partnership the sum of \$1,887.20,

and withdrew from the said business merchandise and money amounting to the sum of \$491.15; that the defendant Carl Hahn contributed to the said partnership the sum of \$1,709.86, and withdrew from the said business merchandise and money amounting to the sum of \$499.76. That on the 22d day of May, 1907, the total assets of said copartnership amounted to \$13,148.27, made up of the following items:

"Merchandise	\$8,140.90
"Accounts receivable	2,797.04
"Fixtures	561.57
"Building and lots	1,538.78
"Cash in Bank	109.98

"And the total liabilities of the said copartnership on the 22d day of May, 1907, were in the sum of \$10,657.13, made up of the following items:

"Wholesale accounts payable by said firm	\$7,706.72
"Capital of Fred Hahn, less amount withdrawn	1,396.05
"Capital of Carl Hahn, less amount withdrawn	1,210.10
"Capital of Emil Oustad, less amount withdrawn	344.26

"That the net profits belonging to the said business on the said 22d of May, 1907, were \$2491.14. That during all of the time mentioned herein neither of the defendants contributed all of their time or services to the management of the said business. That after the 22d day of May, 1907, plaintiff paid for the benefit of the said copartnership the sum of \$1.25 for recording a deed, and the sum of \$9.33 for taxes on real estate owned by the said copartnership, and the defendants on or about June 1, 1907, paid to plaintiff the sum of \$25, leaving a balance of \$14.42 to be credited to said defendants and charged against the plaintiff."

The conclusions of law arrived at by the trial court were that "on account of the acts of the defendants the plaintiff is entitled to a judgment of dissolution of the partnership heretofore existing between the plaintiff and defendants. That the defendants are indebted to the plaintiff in the sum of \$263.71, as plaintiff's share of the profits of the copartnership business, and for the sum of \$830.38, on account of capital contributed to the said copartnership by plaintiff, less \$14.42 paid to plaintiff in excess of what taxes were to be paid by defendants, making in all the sum of \$1,160.22, and that the plaintiff is entitled

to judgment against the defendants for the said sum of \$1,160.22, together with interest thereon at the rate of 7 per cent per annum from and after the 22d day of May, 1907."

The judgment entered by the trial court was that "the partnership heretofore existing between Emil Oustad and Carl Hahn and Fred Hahn, under the firm name of Hahn Brothers & Oustad, be and the same is dissolved, and that Emil Oustad, plaintiff, have and recover of and from Carl Hahn and Fred Hahn, defendants, the sum of one thousand five hundred thirty-two (\$1,532) dollars as principal and interest, and the sum of one hundred seven and $\frac{9}{100}$ dollars, costs and disbursements, making in all the sum of sixteen hundred thirty-nine and $\frac{9}{100}$ dollars."

Noble, Blood, & Adamson, for appellants.

When a partnership is dissolved by judgment or decree, and no showing to the contrary, the date of the dissolution is the date of the entering of the decree. 30 Cyc. 658, and cases cited.

It is error to render a money judgment in favor of any partner against his copartners without a determination of the state of accounts between all the partners, and reduction of the firm assets into money, payment of the firm debts, and a complete exhausting of the debtor partner's interest in such assets. *Bates*, Partn. § 971; *Green v. Stacy*, 90 Wis. 46, 62 N. W. 627; *Carper v. Hawkins*, 8 W. Va. 291; *Durkheimer v. Heilner*, 24 Or. 270, 33 Pac. 401, 34 Pac. 475; *Rosenstiel v. Gray*, 112 Ill. 282; *Levi v. Karrick*, 8 Iowa, 150, 15 Enc. Pl. & Pr. 1109, 1110, and cases there cited.

Weeks & Moum, for respondent.

A decree of dissolution may properly refer back to some prior date, and that even where there is a dissolution by lapse of time for which the partnership was created, or by agreement, a party is entitled to a decree of dissolution. *George*, Partn. p. 333; *Reis v. Reis*, 99 Minn. 446, 109 N. W. 997; 17 Am. & Eng. Enc. Law, 1292.

And an accounting may be had—and the court may resort to the best evidence at hand. *Petty v. Haas*, 122 Iowa, 257, 98 N. W. 104; *White v. Magann*, 65 Wis. 86, 26 N. W. 260; *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135; *Treacy v. Pow-*
27 N. D.—22.

er, 112 Minn. 226, 127 N. W. 936; McGraw v. Dole, 63 Mich. 1, 29 N. W. 477.

A partner who has prevented the sale of the firm assets or their accurate valuation may be charged with their fair value. 30 Cyc. 689, and note 41; Short v. Taylor, 137 Mo. 517, 59 Am. St. Rep. 508, 38 S. W. 952; Burns v. Rosenstein, 135 U. S. 449, 34 L. ed. 193, 10 Sup. Ct. Rep. 817.

The final judgment may, and often does, include an adjudication that a balance is due one partner from another. 30 Cyc. 747.

In an action for accounting between partners, where it appears there is no property to which complaining partner has a claim, but that he is entitled to a personal judgment against the other partners, such judgment may be properly given. McLean v. McLean, 109 Mich. 258, 67 N. W. 118; Strang v. Thomas, 114 Wis. 599, 91 N. W. 237; Wyatt v. Sweet, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525; Petty v. Haas, 122 Iowa, 257, 98 N. W. 104; White v. McGann, 65 Wis. 86, 26 N. W. 260; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135; Holmes v. Gilman, 138 N. Y. 369, 20 L.R.A. 566, 34 Am. St. Rep. 463, 34 N. E. 205; Collyer, Partn. § 324; Adams v. Kable, 6 B. Mon. 384, 44 Am. Dec. 772; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; Reis v. Reis, 99 Minn. 446, 109 N. W. 997; Ciscel v. Wheatley, 27 Wis. 618.

A general partnership is dissolved by the express will of any partner. Rev. Codes 1905, § 5847.

They are trustees for each other. Rev. Codes 1905, § 5827.

A trustee is bound to act in best of good faith. Rev. Codes 1905, § 5712.

BRUCE, J. (after stating the facts as above). No serious fault is found with the findings of fact in this case, nor is there any serious contention that they are not supported by the evidence. They must, therefore, be treated as a verdict of a jury in a common-law action.

The first and principal assignment of error is that the court based its findings of fact upon the condition of the business on May 22, 1907, instead of according to the condition of business at the time of the trial and at the time of the dissolution. There is, appellant contends, no finding as to the condition of the business at any time after May 22.

1907, about two years prior to the date of the complaint, two years prior to the hearing, and about five years prior to the entry of judgment. Though the judgment provides for the dissolution of a copartnership, there is, appellant contends, nothing in the record from which the court can ascertain its condition or make an equitable adjustment among the partners according to its affairs, either at the time of the filing of the complaint or at the time of the entry of the judgment of dissolution.

There is, we believe, no merit in this contention. It may be true, as contended by appellant, that as a general proposition when a partnership is dissolved by judgment or decree, in the absence of any showing to the contrary, the date of the dissolution is the date of the decree. See 30 Cyc. 658. It is, however, equally true that when a firm is dissolved by the agreement of the parties, the dissolution takes effect at the time agreed upon. *Ibid.* Section 5847, Rev. Codes 1905, provides that "a partnership is dissolved as to all the partners by the express will of any partner." Under § 5848, Rev. Codes, 1905, "a general partnership may be dissolved as to himself only by the expressed will of any partner, notwithstanding his agreement for its continuance, subject, however, to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as to entitle him to a judgment of dissolution." The trial court found "that on the 22d day of May, 1907, the said defendants, without the consent of the plaintiff, excluded the said plaintiff from the said business, and ever since had been in the possession of all of the property of the said copartnership." The appellants, therefore, can hardly maintain that a dissolution was not effected on the 22d day of May, 1907. It is true that plaintiff asked in his complaint "that the facts of said copartnership be wound up, and that said copartnership be dissolved." It also prayed, however, "that the defendant be required to pay the plaintiff the sum of \$2,293.55 and interest thereon as and for the plaintiff's interest in said copartnership, on the 22d day of May, 1907, less \$7.41, and less the sum of \$14.42 balance credit received since May 22d, 1907." And though there is a further prayer that "the defendants be required to account to this plaintiff for his share any and all profits made by this copartnership since the 22d day of May, 1907, and up to the entry of judgment," there is a still further

prayer for general equitable relief. Though, too, the plaintiffs were asked to make such an accounting, and upon the trial were requested to produce their books so that the profits and transactions carried on since the 22d day of May, 1907, and up to the time of the trial might be scrutinized and ascertained, the defendants wholly failed to make any such accounting or to produce any such books. The plaintiff, therefore, was entitled to general equitable relief. If there was failure of proof of the transactions between the settlement and the entry of judgment, the fault lay with the defendants. The plaintiff produced all of the evidence that it was in his power to produce, and cannot be deprived of his equitable relief, or of his interest in the settlement arrived at, merely because the defendants have failed to make the accounting asked. 17 Am. & Eng. Enc. Law, 1292; *Petty v. Haas*, 122 Iowa, 257, 98 N. W. 104; *White v. Magann*, 65 Wis. 86, 26 N. W. 260.

But appellants say that with only "\$109.98 cash on hand five years prior to judgment of dissolution and two years prior to the trial, the court places the entire burden of paying the debts of the firm, amounting to \$7,706.72, with interest at 7 per cent after May 22, 1907, on the defendant, and wholly relieves the plaintiff from any liability therefor and from all responsibility for their payment. The judgment compels the defendants to take the book accounts amounting to \$2,797.04 at their face value, and pay the cost of their collection themselves. It also requires the defendants to take the stock of merchandise invoiced at \$8,140.90 and the fixtures invoiced at \$561.50 at their face value, and it requires the defendants also to take the building and lots valued at \$1,538.78 standing in the name of the firm, at their full value, without any transfer from the firm to these defendants; and with all of the assets belonging to the firm, with the exception of \$109.98, consisting of merchandise, accounts receivable, fixtures, building and lots, the court renders a money judgment against the defendants and in favor of the plaintiff partner for \$1,160.22, with interest at 7 per cent from and after May 22, 1907, and renders judgment in favor of the plaintiff and against the defendants for all of the costs and disbursements. The judgment in effect says: 'You defendant partners must pay all of the debts of the copartnership yourselves, and relieve the plaintiff partner from all liability therefor, even though

the debts amount to \$7,706.72, and although you have only \$109.98 in cash to make such payment with. You must take all of the bills receivable at their full face value, and receive nothing for the costs of their collection. You must take the real estate at its full value without any transfer of the copartnership to you. You must take the merchandise and fixtures at their invoiced price, and, although the partnership has only \$109.98 available cash, you must not only pay the debts amounting to \$7,706.72 yourselves without any provision being made for reducing the assets of the copartnership to cash, but in addition to your being required to pay such obligations, you must pay to your copartner in money the sum of \$1,162.22, with interest at 7 per cent from May 22, 1907.'” “Could,” they ask, “the judgment have been more inequitable?” We agree with counsel that the trial court should have required a transfer from the plaintiff to his copartners of his interests in the real estate. With this exception, however, we can find no fault with the finding of the trial court. The finding was based upon the invoice made on May 22, 1907. The plaintiff asked for an accounting in regard to his share of any and all profits made by the copartnership since the 22d day of May, 1907, and up to the entry of judgment. If this accounting had been made it would have shown whether the accounts were good or bad, and what was the real state of the assets of the concern. This accounting, however, was not only not forthcoming, but the defendants failed and refused to produce their books. Such being the case, they cannot complain if the court bases its estimate on the face value of the firm’s notes and securities or accounts, and upon the inventory made. See 17 Am. & Eng. Enc. Law, 1292; 30 Cyc. 689; Short v. Taylor, 137 Mo. 517, 59 Am. St. Rep. 508, 38 S. W. 952; Burns v. Rosenstein, 135 U. S. 449, 34 L. ed. 193, 10 Sup. Ct. Rep. 817.

For the same reasons the appellants cannot complain because of the personal judgment. In this case the trial court found “that on the 22d day of May, 1907, the said defendants, without the consent of the plaintiff, excluded the said plaintiff from the said business, and ever since have been in the possession of all of the property of the said copartnership.” During all of the years intervening between the inventory of May 22d, 1907, and the trial and judgment, the property of the partnership has been in the exclusive control of the defendants,

and even now they have failed to disclose their present condition and value. Under such circumstances the defendants have no ground for complaint.

The judgment of the District Court is affirmed in all respects, with the exception that the plaintiff and respondent is directed to execute a quitclaim deed to the said defendants of the real estate in controversy in this litigation. Appellants will pay the costs and disbursements of this appeal.

Goss, J., being disqualified, did not participate.

Fisk, J., did not participate.

CHRIS SAVOLD v. ABRAM BALDWIN.

(146 N. W. 544.)

Justice court — complaint — summons — forcible entry and detainer — notice to vacate — necessity for.

1. Complaint and summons in justice court reviewed and the action is *held* to be one in forcible entry and detainer, brought under subdivisions 2 or 3 of § 8406, Rev. Codes 1905, under either of which subdivisions notice to vacate the premises was unnecessary before commencement of the action, under § 8407, Rev. Codes 1905.

Action — justice court — jurisdiction — judgment — district court — appeal — error — costs — abide final judgment.

2. The action was started in justice court, where objection was made to the jurisdiction because of want of service and filing of notice to vacate, and overruled, with judgment thereafter entered for plaintiff, from which defendant appealed to the district court on both law and fact, demanding trial *de novo*. The district court, reviewing the objection made in justice court, sustained the same and dismissed the action. *Held* to have been error, and the case is remanded for trial upon the merits. Appellant's costs on this appeal are taxed in the sum of \$10, collection of the same to abide the entry of final judgment.

Opinion filed March 14, 1914.

From the judgment entered on the order of dismissal of the District Court of Benson County, *Cowan, J.*, plaintiff appeals.

Reversed and remanded for trial.

J. E. Skulstad, for appellant.

Defendant's special appearance ripened into a general appearance when he made and filed his answer to the complaint. Rev. Codes 1905, § 8358; *Benoit v. Revoir*, 8 N. D. 226, 77 N. W. 605; *Jennings v. West*, 40 Kan. 372, 19 Pac. 864; *St. Louis & S. F. R. Co. v. Sullivan*, 7 Kan. App. 527, 48 Pac. 945; *Winter v. Union Packing Co.* 51 Or. 97, 93 Pac. 930; 3 Cyc. 504.

The appeal being taken on the whole case, and upon all questions of law and fact, the question of jurisdiction in the district court becomes settled, since such appeal confers jurisdiction. *Lyons v. Miller*, 2 N. D. 1, 48 N. W. 514.

The complaint need not state the particular facts constituting the forcible detainer. 19 Cyc. 1156, 1157; Rev. Codes 1905, § 8408, subdiv. 3.

The notice served is good, as a notice to quit. *Grant v. Marshall*, 12 Neb. 488, 11 N. W. 743; *Miller v. Hall*, 14 Colo. App. 367, 60 Pac. 194; *Lacrabere v. Wise*, 7 Cal. Unrep. 107, 71 Pac. 175; 19 Cyc. 1144.

There is no dispute as to the boundaries of the premises, title, or possession. N. D. Const. § 112; Rev. Codes 1905, § 8345; 19 Cyc. 1143.

Case will be reinstated when fraud or imposition has been used in procuring dismissal. *Rowland v. Kreyenhagen*, 24 Cal. 52.

Judgment of decree procured by fraud will be set aside. Courts of general jurisdiction possess such inherent power. *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; Rev. Codes 1905, §§ 8501, 8509.

The defendant having failed to have the papers and files transmitted to the district court, or to obtain an order therefor, the appeal should have been dismissed. Rev. Codes 1905, § 8501; *Cord v. Barry*, 102 Iowa, 309, 71 N. W. 228; *Foley v. Tipton Hotel Asso.* 102 Iowa, 272, 71 N. W. 236; *Kipp v. Angell*, 10 N. D. 199, 86 N. W. 706; *Giles v. Fluegel*, 10 N. D. 211, 86 N. W. 712; 3 Cyc. 114, 135, 155, 1025.

Stuart & Comstock, for respondent (*Newton, Dullam, & Young*, of counsel).

Everything presented in appellant's abstract should be eliminated from consideration by the court. There is a vast amount of immaterial matter. *Morse v. Stanley County*, 26 S. D. 313, 128 N. W. 153; *Rogers v. Penobscot Min. Co.* 26 S. D. 52, 127 N. W. 471; *Olson v. Lund*, — Iowa, —, 101 N. W. 1128; *Leathers v. Oberlander*, 139 Iowa, 179, 117 N. W. 30; *State v. McCallum*, 23 S. D. 528, 122 N. W. 586.

The complaint seeks to allege a cause of action in forcible entry and detainer. No allegation of possession or right of possession in plaintiff. *Gonzales v. Boren*, 3 N. M. 285, 5 Pac. 336; *Sanchez v. Loureyro*, 46 Cal. 641; *Townsend v. Van Aspen*, 38 Ala. 572; *McGuire v. Cook*, 13 Ark. 448; *McGrew v. Lamb*, 31 Wash. 485, 72 Pac. 100.

The action is not for trespass. *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318; *Andrews v. Thayer*, 40 Conn. 156; *Warren v. Powell*, 122 Ga. 4, 49 S. E. 730.

Goss, J. This is an action in forcible entry and detainer begun in justice court, wherein judgment was rendered in plaintiff's favor and from which an appeal on both law and fact was taken to the district court, where on motion of the defendant, appellant, the action was dismissed on an objection to the jurisdiction made, and overruled in the justice court. The objection raised anew and sustained in the district court as determinative of the issue was "that no notice to quit had ever been served on the defendant and filed with the justice of the peace and returned the same as a summons in a civil action, before the commencement of this action for forcible entry and detainer in justice court." The district court held the motion good, and dismissed the action, with costs. The complaint in justice court, among other things, recites: "That the defendant has no right to the use or occupancy of said lot 10 or any part thereof, but is occupying part thereof as a trespasser, wilfully, unlawfully, and forcibly, to the exclusion of the owner thereof," the plaintiff. The circumstances of the possession are recited, it appearing that the defendant has erected a house extending $7\frac{1}{2}$ feet upon plaintiff's property, and has refused on demand

to remove the same, and is holding possession "unlawfully and forcibly, to the exclusion of the owner thereof." The prayer for relief asks for "the immediate ejectment of defendant off from said lot," and for damages for retention, use, and occupancy at \$5 per month from and after August 1, 1909 (when defendant unlawfully assumed possession) until defendant shall have vacated possession. In the justice court summons we find similar language, charging that the lot was "retained by you unlawfully and forcibly, and to the exclusion of the owner thereof." The complaint was drawn under either one or the other of subdivisions 2 or 3 of § 8406, Rev. Codes 1905, charging that defendant had acquired possession of the real property, and forcibly detains possession thereof as against the plaintiff. Hence no question arises on the sufficiency of the alleged notice to vacate, service of such a notice not being necessary under § 8407, where the action is based upon either or both of subdivisions 2 or 3 of § 8406. Such being the situation, the action of the trial court in dismissing the action as one requiring notice to quit, as a condition precedent to the maintaining of the action, was error, which error is apparent on the judgment roll, from an inspection of the pleadings and the order of dismissal reciting the grounds upon which it is based. Mention is made of this, as it is contended that no error can be urged by appellant as no statement of the case has been settled. The error appears from and is based upon the judgment roll, and no statement of the case is necessary to enable appellant to raise it. The district court is directed to vacate its order and judgment of dismissal; and the appeal having been taken on both law and fact, the district court will retain the cause and allow trial thereof upon the merits. Plaintiff and appellant will, on entry of final judgment, be allowed his costs and disbursements of his appeal to this court, hereby taxed at the sum of \$10, collection of the same, however, to abide the final judgment. Argument on the merits was not allowed on appeal, the judgment originally appealed from amounting to less than \$50 inclusive of costs.

FISK, J., did not participate.

MARY L. MANN v. W. F. REDMON, Administrator of the Estate
of Edward E. Redmon, Deceased.

(145 N. W. 1031.)

From a judgment ordered on a motion for judgment on the pleadings, on the grounds that by plaintiff's complaint and summons, and proof of the date of service thereof, it was affirmatively established that the action was brought more than ninety days after the claim became rejected by the administrator, defendant appeals, contending that the statute of nonclaim, § 8105, Rev. Codes 1905, must be raised by answer to be available as a defense, and that when so raised he may prove facts avoiding its force without having plead them, under § 6878, Rev. Codes 1905, providing that new matter in an answer "is to be deemed controverted by the adverse party as upon a direct denial or avoidance as the case may require." *Held*:—

Claim against estate — presentation — rejection — proving — suit — time of bringing — tolling of statute — cause of action.

1. The necessity of proving the presentation and rejection of a claim against a decedent's estate, and of suit begun within ninety days from such rejection, is upon plaintiff as a part of the proof of his cause of action, and this without regard to whether the defendant has answered pleading the statute of nonclaim.

Complaint — summons — proof of service — lapse of time — judgment of dismissal — motion for.

2. Where the complaint, summons, and proof of service affirmatively and conclusively show that the action brought upon such a claim against a decedent's estate was not commenced until ninety-seven days after the rejection of a claim by the administrator, or one hundred and seven days after its presentation, judgment of dismissal for want of a cause of action was properly entered upon motion therefor, based upon the summons, complaint, and proof of service.

Opinion filed February 28, 1914. Rehearing denied March 24, 1914.

Judgment of dismissal of action granted on motion by the District Court of Cass County, *Pollock, J.*

Affirmed.

Taylor Crum, for appellant.

Plaintiff has an absolute legal right to contest the allegations of defendant's answer, either as upon direct denial, or avoidance, as the

case may be. N. D. Rev. Codes, 1905, § 6878; *Stenson v. Elfmann*, 26 S. D. 134, 128 N. W. 588; *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743; *Scott v. Northwestern Port Huron Co.* 17 N. D. 91, 115 N. W. 192; *Meyer v. School Dist.* 4 S. D. 420, 57 N. W. 68; *Lyon v. Plankinton Bank*, 15 S. D. 400, 89 N. W. 1017; *Viele v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 90; *Powers v. Kueckhoff*, 41 Mo. 425, 97 Am. Dec. 281; *Curtiss v. Sprague*, 49 Cal. 301.

Estoppels *in pais* are not required to be pleaded. Rev. Codes 1905, §§ 6851, 6863, 6878; *Rogers v. King*, 66 Barb. 495; *Sass v. Thomas*, 6 Ind. Terr. 60, 11 L.R.A.(N.S.) 267, 89 S. W. 656.

All new matter set up in the answer, not amounting to a counterclaim, the plaintiff may now reply to, by his proof. *Sass v. Thomas*, 82 C. C. A. 19, 152 Fed. 627; *Babcock v. Maxwell*, 21 Mont. 507, 54 Pac. 943; *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 467, 34 Am. Rep. 550; *Argall v. Jacobs*, 87 N. Y. 114, 41 Am. Rep. 357; *Argotsinger v. Vines*, 82 N. Y. 315; *Dean v. Crall*, 98 Mich. 591, 39 Am. St. Rep. 571, 57 N. W. 813; *Gooding v. Underwood*, 89 Mich. 187, 50 N. W. 818; *Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904; *Towney v. Sparks*, 23 Neb. 142, 36 N. W. 375; *Caldwell v. Auger*, 4 Minn. 217, Gil. 156, 77 Am. Dec. 515; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846; *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51; *Hostler v. Hays*, 3 Cal. 302.

It is the law that if, pending the running of the statute, the time of payment has been extended by the creditor with the assent of the debtor, the statute does not run during such suspension; it is not necessary that such contract be in writing and signed by the debtor. *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Wood, Limitations*, § 76; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *Gaylord v. Van Loan*, 15 Wend. 308; *Holman v. Omaha & C. B. R. & Bridge Co.* 117 Iowa, 268, 62 L.R.A. 395, 94 Am. St. Rep. 293, 90 N. W. 833; *Schroeder v. Young*, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512.

Plaintiff relied upon the agreement with defendant, and the defendant is estopped from interposing the bar of the statute. *Armstrong v. Levan*, 109 Pa. 177, 1 Atl. 204; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344; *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; *State Trust Co. v. Sheldon*,

68 Vt. 259, 35 Atl. 178; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Quick v. Corlies*, 39 N. J. L. 11; *Paddock v. Colby*, 18 Vt. 485; *Herman, Estoppel*, § 825; *Cowart v. Perrine*, 21 N. J. Eq. 101; *Gaylord v. Van Loan*, 15 Wend. 308; *Randon v. Toby*, 11 How. 493, 13 L. ed. 784; *Warren v. Walker*, 23 Me. 453; *Hodgdon v. Chase*, 29 Me. 47; *Schroeder v. Young*, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; *Bish v. Hawkeye Ins. Co.* 69 Iowa, 184, 28 N. W. 553; *Little v. Phoenix Ins. Co.* 123 Mass. 380, 25 Am. Rep. 96; *Bridges v. Stephens*, 132 Mo. 524, 34 S. E. 555; 1 Wood, *Limitations*, 2d ed. § 76; 13 Am. & Eng. Enc. Law, 718; *Missouri P. R. Co. v. B. F. Coombs & Bro. Commission Co.* 71 Mo. App. 299; *Wells, F. & Co. v. Enright*, 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 439; *Clark v. Augustine*, 62 N. J. Eq. 689, 51 Atl. 68; *Kellogg v. Dickinson*, 147 Mass. 432, 1 L.R.A. 346, 18 N. E. 223; *Noyes v. Hall*, 28 Vt. 645.

Forbearance to sue was a sufficient consideration. *Bank of Woodland v. Heron*, 122 Cal. 107, 54 Pac. 537; *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344; *Wood v. Goodfellow*, 43 Cal. 185; *Randon v. Toby*, 11 How. 493, 13 L. ed. 784; Wood, *Limitations*, § 76; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Wells, F. & Co. v. Enright*, 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 439.

The promise to waive the statute being conditional, plaintiff must bring herself within the terms of the promise. Wood, *Limitations*, § 77; *Robbins v. Otis*, 1 Pick. 368; *Bush v. Barnard*, 8 Johns. 407; *Davies v. Smith*, 4 Esp. 36.

"When the reason of a rule ceases, so should the rule itself." Rev. Codes 1905, § 6659; *Clark v. Augustine*, 62 N. J. Eq. 689, 51 Atl. 68; Broom, *Legal Maxims*, 7th ed. 159.

The maxims of jurisprudence are not intended to qualify the positive rules of law, but to aid in their just application. *Carroll v. Rye Twp.* 13 N. D. 465, 101 N. W. 894; *Green v. Liter*, 8 Cranch, 229, 249, 3 L. ed. 545, 552; *Re Amendments to Rules 1 & 10*, 27 L. ed. 629, 1 Sup. Ct. Rep. 125, 108 U. S. 3; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 483; *Reno Smelting Mill. & Reduction Works v. Stevenson*, 20 Nev. 269, 4 L.R.A. 64, 19 Am. St. Rep. 364, 21 Pac. 317; *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 6 L.R.A. 280, 17 Am. St. Rep. 791, 18 Atl. 1012; *Isaacs v. Barber*, 10 Wash. 124, 30 L.R.A. 680, 45 Am. St. Rep. 772, 38 Pac. 871; *State v. Becker*, 3 S. D.

29, 51 N. W. 1018; Shayne v. Evening Post Pub. Co. 168 N. Y. 70, 55 L.R.A. 777, 85 Am. St. Rep. 654, 61 N. E. 115; Kerner v. McDonald, 60 Neb. 663, 83 Am. St. Rep. 550, 84 N. W. 92.

Augustus Roberts and Pollock & Pollock, for respondent.

This action was not commenced within the ninety days' period as fixed by the statute, and is therefore barred. *Mann v. Redmon*, 23 N. D. 508, 137 N. W. 478; Rev. Codes 1905, § 8105; *Singer v. Austin*, 19 N. D. 546, 125 N. W. 560; *Farwell v. Richardson*, 10 N. D. 34, 84 N. W. 558; *Fitzgerald v. First Nat. Bank*, 64 Neb. 260, 89 N. W. 813; *Mars v. Oro Fino Min. Co.* 7 S. D. 605, 65 N. W. 19; *Haug v. Great Northern R. Co.* 42 C. C. A. 167, 102 Fed. 74.

After plaintiff's claim had been rejected, it was not within the power of defendant to waive the provisions of the statute, or to extend the time within which to bring suit. *Farwell v. Richardson*, 10 N. D. 34, 84 N. W. 558; *Singer v. Austin*, 19 N. D. 546, 125 N. W. 560; *Underwood v. Brown*, 7 Ariz. 19, 60 Pac. 700; *Dern v. Olsen*, 18 Idaho, 358, 110 Pac. 164, Ann. Cas. 1912A, 1; *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482; *Boyce v. Fisk*, 110 Cal. 107, 42 Pac. 473; *Wells, F. & Co. v. Enright*, 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 439.

There was no question of waiver in the case, because not pleaded. *Bliss*, Code Pl. 3d ed. § 364, and notes; 16 Cyc. 809; *Bruce v. Phoenix Ins. Co.* 24 Or. 486, 34 Pac. 16; *Homburger v. Alexander*, 11 Utah, 363, 40 Pac. 260; *Eisenhauer v. Quinn*, 36 Mont. 368, 14 L.R.A. (N.S.) 435, 122 Am. St. Rep. 370, 93 Pac. 38; *Chapman v. Hughes*, 134 Cal. 641, 60 Pac. 974, 66 Pac. 983.

Goss, J. This is the second appearance of this case. See *Mann v. Redmon*, 23 N. D. 508, 137 N. W. 478. This appeal is from a judgment of dismissal entered on a motion by defendant for judgment upon the pleadings and files. We need review but the complaint of the plaintiff, including an attached verified claim, by the terms of the complaint made a part thereof, and the date of service.

From the complaint it appears that the action is brought against the administrator of an estate to recover damages, that it was necessary to file such claim with the administrator for allowance in the usual course of administration, and that the claim was so filed for such pur-

pose after publication had been made of notice to creditors to present claims. The complaint reads: "That on the 25th day of October, 1910, at Fargo, North Dakota, the claim hereinbefore and hereinafter set forth, verified by the oath of the claimant and upon which this action is founded, was duly presented in writing by the plaintiff to the defendant as such administrator for allowance. And that the same was by him as such administrator, as plaintiff is informed and verily believes, orally rejected, and, in so far as plaintiff is informed and believes, was never indorsed or filed with the court. That a duplicate copy of said claim is hereto attached and made a part of this complaint." The complaint was verified February 11, 1910, with the summons bearing the same date, and the return of the sheriff proved service made upon the administrator of summons and complaint February 16, 1911, to amend which return the officer receiving it for service testifies that he received the same for service February 14, 1911, and served the same upon the administrator two days later. And to this extent the original return of service is so amended, and thereon as amended, and upon the summons and complaint, defendant, on the eve of trial, moved for judgment of dismissal on the ground that it was established "by plaintiff's complaint that she presented her claim upon which this action is brought to the defendant administrator on the 25th day of October, 1910, in writing, duly verified, for allowance. That plaintiff did not bring this action until on or about the 11th day of February, 1911, as appears by the date of the plaintiff's summons, and not until the 14th day of February, 1911, as appears from the return of service of plaintiff's summons and complaint herein upon defendant by the sheriff of Cass county, . . . being more than 100 days after plaintiff presented her claim to the defendant herein, . . . and, therefore, that plaintiff's said claim at the time this action was commenced was by the statutes of nonclaim, §§ 8103-8106, Rev. Codes 1905, of North Dakota, forever barred, and that an action at law to enforce or collect said claim could not be brought at the time when this action was commenced or at any subsequent time." We have omitted, in quoting the motion, reference to the answer and the reply thereto, which latter had been withdrawn, treating the motion as based upon the summons complaint, and return of service as amended, thus taking as a basis a statement of facts most unfavorable to the defendant, inasmuch as the

answer pleads the statute of nonclaim and the reply admits that the suit was instituted too late, but attempts to plead a waiver or estoppel founded upon some oral agreement between the administrator and the plaintiff or her attorney, that the plaintiff could delay suing, and the administrator would waive the benefit of the statute of nonclaim, which reply was withdrawn by the court's permission in the face of a motion for judgment on the pleadings, withdrawal being allowed on the theory that it was an unnecessary pleading under the provisions of § 6878, Rev. Codes 1905, inasmuch as under said statute the new matter of the answer "is to be deemed controverted by the adverse party as upon direct denial or avoidance as the case may require." We can assume that the reply was needless, and ignore it, as we do the answer, and pass upon the law issue presented of whether defendant was entitled to judgment of dismissal upon plaintiff's own complaint, supplemented by the uncontrovertible proof of when the action was commenced. The trial court evidently concluded that plaintiff's complaint, considered with the fact of when the action was commenced, presented no issue for trial. We are of the same opinion. The statute had run against suit upon this claim on February 4, 1911, on which date the bar of the statute fell. The motion but assumed as true the complaint of the plaintiff, from which, together with the date of commencement of the action, it affirmatively appeared that no cause of action was stated. And this was so regardless of the answer. In the former appeal we did not adjudge a dismissal of plaintiff's action, because, as appears from that opinion, to do so it would have been necessary to consider matters *dehors* the complaint. Now we are not so limited, and must take notice of the date of the summons and the proof of service thereof in connection with the facts stated in plaintiff's complaint, all of which establish that plaintiff presents no issue, but instead affirmatively discloses that the facts plead could not constitute a cause of action. Had the motion not been made at the commencement of trial, but instead at the close of plaintiff's case, she could not, under her sworn complaint, have then avoided a directed verdict of dismissal. She would then be in exactly the same position she was in when the motion was made, the motion of course admitting as true every statement in the complaint. Thus plaintiff cannot change the issue presented by the contention that under § 6878, Rev. Codes 1905, she might on trial

have avoided the force of the statute of nonclaim. The order of proof would necessarily have to be changed to avail plaintiff under her contention, and this could not be done in any manner. Defendant was under no burden to offer any proof under his answer. Although he answered that did not relieve plaintiff from the necessity of proving, as a part of his cause of action, the seasonable presentation and rejection of the claim, and facts from which the court may either take judicial notice or learn that the suit is begun thereafter within the statutory period allowed for suit against the estate after rejection of claim. Otherwise the statute of nonclaim could in effect be waived by a mere failure to answer or plead the same. Plaintiff's contention is in effect that when she has proven the rejection of the claim she may then prove its merit, and the burden of establishing that the action is begun too late devolves upon the defendant, who must defend upon that ground, whereupon plaintiff may then either deny or avoid, under § 6878, Rev. Codes 1905, without further pleading. This reasoning assumes that a cause of action may be established against an estate without an affirmative showing on plaintiff's part that the same is brought within the three months' period provided after rejection of the claim, which is contrary to the law of this case as declared by our former holding, on first appeal, and *Farwell v. Richardson*, 10 N. D. 35, 84 N. W. 558, as well as contrary to the express terms of § 8105, Rev. Codes 1905, providing that if not sued "within three months after the date of its rejection . . . the claim is barred forever." The burden of proof cannot thus be shifted, but is right where it was at the commencement of this action, *i. e.*, upon the plaintiff to affirmatively establish as a part of her cause of action the jurisdictional facts of the rejection of the claim and the commencement of suit thereafter within the period allowed by law. Otherwise the claim is one within the cognizance of the probate court as made against a decedent's estate.

Counsel persists in contending that we are dealing with an ordinary statute of limitation of actions. We are not. That was set at rest in the former appeal. The time within which a suit must ordinarily be brought or be maintained, subject to a defense that the action is barred by facts showing the action to be limited by time, as under the ordinary statutes of limitation of actions, is one thing. There, the right of action, the claim, is barred by withholding the remedy, the action

for enforcement. Here, the claim itself does not exist against the estate, it having ceased to exist as such a claim at the expiration of the statutory period after rejection, unless it is kept alive by suit. In the former case, the limitation statute creates a limitation in repose; in the latter, a limitation in bar.

Defendant need not have answered. Plaintiff could not have procured judgment without proof of her cause of action, a part of which must have been of the fact of rejection; and, further, that suit was brought within the statutory time upon the rejected claim. Under proof of all facts recited in plaintiff's complaint, including proof that it was a claim being asserted against a decedent's estate, the court, being obliged to take judicial notice of its own records showing suit brought too late, could do nothing but dismiss because of failure of proof of a cause of action. Plaintiff's right to recover, therefore, cannot be made to depend upon whether she can avoid the defense as plead, but must be decided instead upon whether she has established a cause of action, assuming that she can prove all facts recited in her complaint. Under the statute and our own decisions, it is affirmatively established that plaintiff has no cause of action, and the judgment appealed from is affirmed, with costs.

SAMUEL J. RABINOWITZ et al. v. W. S. CRABTREE.

(145 N. W. 1055.)

Appeal — state of case — default in preparing — relief — order refusing — final order — substantial right — appealable.

An order refusing to relieve appellant from default in preparing and serving his proposed statement of the case is a final order affecting a substantial right, and is appealable.

Opinion filed March 25, 1914.

Appeal from the County Court of Stutsman County, *Hemmi, J.*
Motion to dismiss the appeal denied.

C. S. Buck and *John A. Jorgenson*, of Jamestown, North Dakota,
for defendant and appellant.

27 N. D.—23.

Jones & Hutchinson, of La Moure, North Dakota, and *Thorpe & Chase*, of Jamestown, North Dakota, for plaintiffs and respondents.

BURKE, J. Plaintiffs recovered judgment in the lower court upon a jury trial. The defendant instructed his attorneys to move for judgment notwithstanding the verdict or for a new trial, and in case this motion was denied to appeal to this court. Owing to a misunderstanding with the official court stenographer a transcript of the evidence was not ordered, and plaintiffs, assuming that no appeal would be taken, issued execution. This was defendant's first intimation that no appeal had been taken, and he thereupon made application to the court for an order granting him additional time in which to procure a transcript of the testimony, to prepare a statement of the case, and to move for judgment notwithstanding the verdict, etc. This motion came on for hearing upon affidavits, and was denied by the court. From this order of denial defendant appealed to this court, and the present controversy is brought about through a motion of the plaintiffs to dismiss the said appeal upon the ground that the order is not appealable. This opinion will not deal with the merits of the case itself or of the application for an extension of time, but will be confined to the proposition; *viz.*, is the order of the trial court one that can be reviewed upon appeal to this court?

(1) The application to the trial court was made either under § 7068 or § 6884, Rev. Codes 1905. Section 6884 reads: "The court may likewise, in its discretion and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this Code, or by an order enlarge such time; and may also, in its discretion and upon such terms as may be just at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may, in like manner and upon like terms, permit an amendment of such proceedings, so as to make it conformable thereto." This section was formerly § 143, Code of Civil Procedure 1877. Sections 7058 and 7065 relate to preparations and settlements of statements of the case, and

notice, of motions for new trials, and § 7068 reads: "The court or judge may, upon good cause shown in furtherance of justice, extend the time within which any of the acts mentioned in §§ 7058 and 7065 may be done, or may, after the time limited therefor has expired, fix another time within which any of such acts may be done." This last section is taken from § 8, chapter 21, Compiled Laws of 1887, was incorporated as § 5477, Rev. Codes 1895, and is now found in § 7, chap. 131, L. L. 1913. As § 7068 more specifically relates to the subject of settling statements of the case, its terms will probably govern in case of a conflict with § 6884.

Under either section, however, it is clear that the trial court may extend the time for settling a statement of the case in furtherance of justice and upon good cause shown. Whether or not such cause was shown in this case was a matter in dispute before the trial court, and his decision was challenged by the defendant. As already stated, this opinion will not deal with the correctness of such order, but merely with the question of the rights of the defendant to appeal at all.

Section 7225, Rev. Codes 1905, specifies what orders may be appealed to the supreme court, and subdivision 2 provides that an appeal may be had from a final order affecting a substantial right made in special proceedings, or upon a summary application in an action after judgment. The above section covers the legal proposition here involved. The order of the trial court ended the remedies of the defendant. If he cannot avoid such order he can take no further steps in the litigation, but must submit to the judgment entered against him. It is conceded that the trial court can extend the time only upon good cause shown, but whether or not good cause has been shown is a dispute of fact in the decision of which the trial court must use his discretion, and has a right to err. *Lindblom v. Sonstelie*, 10 N. D. 140, 86 N. W. 357. It being conceded, then, that the trial court has jurisdiction of the subject-matter, it cannot be reached by mandamus or certiorari. In *Sly v. Kilbourn City*, 144 Wis. 203, 128 N. W. 872, it is said: "There is no question but that this was the final order made upon a summary application in an action after judgment. But it is contended that the order does not affect a substantial right, and therefore is not appealable. It has long been a rule of practice in this court that upon appeal from discretionary

orders, if the discretion of the court below has been abused, the order will be reversed, but if it is found that the discretion has not been abused the appeal will be dismissed." The language used in *Hatch v. Kurtzweil*, 112 Wis. 231, 87 N. W. 1082; *Wood v. Blythe*, 42 Wis. 300, and stating generally that orders of this kind are not appealable, is too broad, and should be restrained. In *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176, it is said: "But when the party seeking the settlement has not strictly and fully complied with statutory requirements, and appeals to the court for relief upon the ground that his failure has been caused by surprise, accident, or excusable neglect, and when necessarily the granting of relief rests in the sound discretion of the court, a different case is presented. In such a case mandamus is a wholly inadequate remedy, because the discretion of the trial court may not be coerced. (*Stonesifer v. Armstrong*, 86 Cal. 594, 25 Pac. 50). Its exercise of discretion may, however, be reviewed on appeal from the order denying relief. . . . In the case of *Kaltschmidt v. Weber*, 136 Cal. 675, 69 Pac. 497, an appeal from an order granting relief on the ground of excusable neglect, and settling a statement, was dismissed upon the ground that it was reviewable only upon an appeal from an order granting or refusing a new trial. This was in accordance with numerous decisions of this court based upon the obvious distinction between the effect of settling and refusing to settle a statement on motion for a new trial. The latter is necessarily final, and must be corrected, if at all, by mandamus, where it will lie, or by an appeal, where mandamus is not available. The former is but an intermediate step in the proceeding which culminates in an order granting or refusing a new trial, and can only be reviewed on appeal from the final order. There is no want of harmony in these various decisions if the plain distinction between the cases is observed."

In the case at bar, mandamus evidently will not lie, because the court has exercised his discretion. Had he refused to act, a different case would be presented. Had he allowed the extension of time, the order would be reviewable in connection with the main appeal, and there would be no necessity for a separate appeal from the order; but the application was denied, thus making the order final. It therefore affects the substantial right of the defendant, and is appealable. Motion to dismiss the appeal is denied.

MARTIN NELSON v. M. GASS.

(146 N. W. 537.)

At the city election in Larimore, held April 7, 1913, contestant received 113 votes and defendant 116 votes for the office of mayor. This proceeding is a contest over such office, brought under the provisions of § 688, and the remaining sections of art. 13 of chap. 8 of the Political Code, Rev. Codes 1905, providing a method for contesting elections.

City council — composed of mayor and alderman — mayor — chief duties — executive — presiding officer — member of council only in limited sense — contest — office of mayor — council — has no jurisdiction.

1. Section 2660, Rev. Codes 1905, provides that the city council shall be composed of the mayor and aldermen. *Held*, that the chief duties of the mayor are as the executive officer of the city; that he is not a member of the council, except in a very limited sense, having only the right to preside and cast the deciding vote in case of a tie; and that, under the provisions of § 2665, Rev. Codes 1905, that the city council shall be the judge of the election and qualifications of its own members, that body has no jurisdiction to try and determine a contest over the office of mayor.

Contest — jurisdiction — district courts — mayor.

2. Sections 688 et seq., Rev. Codes 1905, which prescribe a method for contesting elections for county offices, and give the district courts jurisdiction, and § 2746, Rev. Codes 1905, which reads: "The manner of conducting and voting at elections to be held under this chapter [city elections] and contesting the same, the keeping of poll lists, and canvassing the votes, shall be the same, as nearly as may be, as in the case of the election of county officers under the general laws," give the district court jurisdiction to hear and determine contests over the election of mayor of a city.

Challenged voter — advised and assisted by contestee — not violation of law.

3. The vote of one H. was challenged. He went to the place of business of contestee and told him that he had to swear in his vote, and asked him to "sign it up for me." Contestee then went to the polling place and signed the statutory affidavit required to enable one whose vote is challenged to vote. Some of the officials testified that, after doing so, he told H. to go and vote, that he was a legal voter. As to what he did tell him, if anything, the evi-

Note.—On the question whether provision for testing election of city officer before city council or other municipal body is exclusive of remedies in the courts, see note in 26 L.R.A.(N.S.) 207. As to whether "residence" as a qualification of voters means "domicil," see note in 19 L.R.A.(N.S.) 759.

dence is conflicting. *Held*, that there is sufficient evidence to sustain the finding of the trial court that contestant did not violate § 16 of chap. 129, Laws of 1911, known as the corrupt practices act, which makes it unlawful for any person on the day of an election to ask, solicit, or in any manner try to induce or persuade any voter on such election day to vote, or refrain from voting, for any candidate or ticket of any political party or organization or any measure.

Voter — residence — temporary absences — precinct.

4. One H. had voted in Larimore for many years, claiming it to be his residence. He had a room and furniture, including stove, bed, and table, in the Salvation Army hall, where he went when out of work, and considered it his home, and when working, as he did, out of town, for periods of greater or less length of time, he frequently went to town, and when there slept in his room, which had a lock and a key, and left most of his things there. It is *held*, in view of these considerations and others stated in the opinion, that he was a qualified voter in the precinct in which he voted.

Residence — required period of time — qualifications of voter — room — board — home — declarations of voter.

5. One M., a single man, voted for contestee. He had lived around Larimore four or five years, and, beginning in the fall of 1912, worked for one P., 12 miles out of Larimore, and continued to work for him until the 29th of March, 1913, when he went to work for one S. When he went to town, he usually stayed at the place of one Prevost, but, from the time he commenced to work for P. in the country, he had neither room nor board at the place in town, and was not there, and left no trunk there. He was not related to Prevost; had lived in Logan township, which he left when he went to work for P. *Held*, notwithstanding the fact that he testified that his only home was at Prevost's place, and that he was there three weeks before going to work for P., that, when he was out of a job, he stopped at Prevost's, paying him for board and lodging, and left some of his clothes there to save carrying them around, that the proof negatives it being his residence for ninety days next preceding the election.

Voter — resident of precinct — required period.

6. One H. was a single man and a farm laborer. He testified that he had no particular headquarters except where he worked. During the summer of 1912, he worked in the country and had his effects with him. In September he went to work on a farm adjoining the city, kept his trunk there and slept there, but took his meals in town. The 1st of February, 1913, less than ninety days before election, he went to work in another place in the country, where he worked until the 28th of March, when he went into town for three days and stayed at a hotel in a different precinct from the one in which he voted. He then resumed work on the farm adjoining town. *Held*, that he was

not a resident of the precinct where he voted for ninety days next preceding the election.

Employee — residence — voter — qualifications.

7. The vote of one R. is challenged. He worked for one P., whose headquarters were in Larimore, but who employed men to work in different places in the country. When in Larimore, R. stayed at P.'s place until sent out on a job. After completing one job and before commencing another, he always returned to P.'s place and slept there. He made that his home. *Held*, that he was entitled to vote.

Intent of voter — good faith — definite place home — essential element in qualifications — domicile — voting purposes — absence from precinct — defeats right to vote.

8. A good-faith intent of a voter to make a definite place his home for all purposes is one essential element entering into the determination of the question of his residence for the purpose of qualifying him to vote, and a domicile, once gained, does not continue until a new one is acquired, for voting purposes, neither does the right to vote in a particular precinct continue until the right to vote elsewhere is shown. But the shortest absence coincident with an intention to change the residence defeats the right to vote at the former domicile.

Residence — place of — voting purposes — established home — habitually present — absent from — intention — return — acts.

9. The place of one's residence for the purpose of voting is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return, and must be determined from all the facts and circumstances, and the intention must be accompanied by acts in harmony therewith.

District court — judgment — vacated — tie — determination — by lot.

10. The trial court found that contestee received 115 legal votes, including the votes of M. and H., above referred to, and *held* illegal. It follows that there was a tie. The judgment of the district court is vacated, and it is directed to enter judgment in accordance with this determination, and directing the parties to proceed in conformity with the provisions of § 2747, Rev. Codes 1905, which requires the determination by lot of who shall hold the office of mayor in case of a tie.

Opinion filed March 3, 1914. Rehearing denied April 1, 1914.

Election contest over the office of mayor of Larimore; appeal from Grand Forks County, *Honorable C. M. Cooley, J.*

Judgment for contestee vacated.

S. J. Radcliff and Scott Rex, for appellant.

Section 602, Revised Codes, provides for elections. Article fourteen (14) of chapter twenty (20) contains the provisions relative to city elections. Appellant contends that such provisions give the district courts of this state jurisdiction, and are applicable to a contest over the office of mayor of an incorporated city. 15 Cyc. 397; State ex rel. Simpson v. Dowlan, 33 Minn. 536, 24 N. W. 188; State ex rel. Diepenbrock v. Gates, 35 Minn. 385, 28 N. W. 927; State ex rel. Jarvis v. Craig, 100 Minn. 352, 111 N. W. 3; Treat v. Morris, 25 S. D. 615, 127 N. W. 554; State ex rel. Anderton v. Kempf, 69 Wis. 470, 2 Am. St. Rep. 753, 34 N. W. 226; Com. v. Allen, 70 Pa. 465; State ex rel. Smith v. Anderson, 26 Fla. 240, 8 So. 1; People ex rel. Swift v. Bingham, 82 Cal. 240, 22 Pac. 1039; Dawson v. Superior Ct. 158 Cal. 73, 110 Pac. 479; People ex rel. Hatzel v. Hall, 80 N. Y. 117; Holbrock v. Smedley, 79 Ohio St. 391, 87 N. E. 272, 16 Ann. Cas. 155; State ex rel. Blake v. Morris, 14 Wash. 262, 44 Pac. 266; State ex rel. Heath v. Kraft, 18 Or. 550, 23 Pac. 663; Winter v. Thistlewood, 101 Ill. 450; Cate v. Martin, 70 N. H. 135, 48 L.R.A. 613, 46 Atl. 54.

Mr. Gass solicited, induced, and persuaded a person to vote, on election day. Such person swore in his vote at the solicitation of Gass. Such acts are in violation of corrupt practice act of this state. Laws are to be liberally construed in the public interest. Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280; Whaley v. Thomason, 41 Tex. Civ. App. 405, 93 S. W. 212; Healy v. State, 115 Md. 377, 80 Atl. 1074; State v. Milby, 26 Wash. 661, 67 Pac. 362.

The testimony of a witness (voter) that he had claimed the place where he voted, as his residence for years, is discredited by proof that he recently voted in another distant precinct. Carter v. Putnam, 141 Ill. 133, 30 N. E. 681.

The *claim* of residence in a given place is not sufficient. It must be coupled with *acts* which bear out such claim. People v. Ellenbogen, 114 App. Div. 182, 99 N. Y. Supp. 897; Rev. Codes 1905, § 12.

The safest test of where a man's residence is, is where he usually sleeps. Linger v. Balfour, — Tex. Civ. App. —, 149 S. W. 795; Estopinal v. Michel, 121 La. 879, 19 L.R.A.(N.S.) 759, 46 So. 907; Moffett v. Hill, 131 Ill. 239, 22 N. E. 821; State ex rel. Hallam v. Lally, 134 Wis. 253, 114 N. W. 447, 15 Ann. Cas. 242; White v.

Slama, 89 Neb. 65, 130 N. W. 978, Ann. Cas. 1912C, 518; Widmayer v. Davis, 231 Ill. 42, 83 N. E. 87.

The men H., R., and M. were illegal voters. It was a part of plaintiff's case to prove that these men voted for Gass. Where the election is by secret ballot an illegal voter may be compelled to testify for whom he voted. *State ex rel. Doerflinger v. Hilmantel*, 23 Wis. 422; *People v. Turpin*, 49 Colo. 234, 33 L.R.A.(N.S.) 766, 112 Pac. 539, Ann. Cas. 1912A, 724; *Skain v. Milward*, 138 Ky. 200, 127 S. W. 773; *Black v. Pate*, 130 Ala. 514, 30 So. 434.

Circumstantial evidence is ample to show how and for whom a person voted. *White v. Slama*, 89 Neb. 65, 130 N. W. 978, Ann. Cas. 1912C, 518; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240; *Widmayer v. Davis*, 231 Ill. 42, 83 N. E. 87; *Welsh v. Shumway*, 232 Ill. 54, 83 N. E. 549; *Buckingham v. Angell*, 238 Ill. 564, 87 N. E. 285.

The constitutional provision for a secret ballot (§ 129, Const.) is not self-executing, and it seems clear that appellant should have been permitted to prove that the election was not secret, and therefore to require answers from these voters as to whom they voted for. *Ibid*.

D. P. Bates, Geo. R. Robbins, and Geo. A. Bangs, for respondent.

Elections, and all matters related thereto, are confided to the legislative department; courts cannot interfere therewith; the legislature may provide a tribunal to determine the result thereof, and such result is final. 15 Cyc. 394; *State ex rel. Narveson v. McIntosh*, 95 Minn. 243, 103 N. W. 1017; *Moore v. Hoisington*, 31 Ill. 243; *Moore v. Mayfield*, 47 Ill. 169; *People v. Smith*, 51 Ill. 177; *Dickey v. Reed*, 78 Ill. 266; *Jennings v. Joyce*, 116 Ill. 179, 5 N. E. 534; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 238; *Keating v. Stack*, 116 Ill. 193, 5 N. E. 541; *Allerton v. Hopkins*, 160 Ill. 448, 43 N. E. 753; *Canby v. Hartzell*, 167 Ill. 628, 48 N. E. 687; *Baird v. Hutchinson*, 179 Ill. 435, 53 N. E. 567; *Douglas v. Hutchinson*, 183 Ill. 323, 55 N. E. 628; *Brueggemann v. Young*, 208 Ill. 181, 70 N. E. 292; *Simon v. Portland*, 9 Or. 443; *McWhorter v. Dorr*, 57 W. Va. 608, 110 Am. St. Rep. 815, 50 S. E. 838; *State ex rel. Fawcett v. Superior Ct. (Fawcett v. Pritchard)* 14 Wash. 604, 33 L.R.A. 675, 45 Pac. 23; *Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 26; *State v. Buchanan*, 35 La. Ann. 89; *State ex rel. Woodruff v. Dortch*, 41 La. Ann. 850, 6 So. 777; *Reynolds & H. Constr. Co. v. Police Jury*, 44 La. Ann. 863, 11

So. 236; *Hipp v. Charlevoix County*, 62 Mich. 456, 29 N. W. 77; *Moulton v. Reid*, 54 Ala. 320; *Skrine v. Jackson*, 73 Ga. 377; *Caldwell v. Barrett*, 73 Ga. 604; *Clarke v. Rogers*, 81 Ky. 43; 15 Cyc. 393; *McCrary, Elections*, 344; *Paine, Elections*, 793.

The general contest law does not authorize this contest. Rev. Codes 1905, §§ 688, 690, 693.

The statutory provisions embraced within § 2665, Rev. Codes, are analogous to § 47, Constitution, which reads: "Each House shall be the judge of the election returns and qualifications of its own members." Under such provision, courts cannot acquire jurisdiction. *State v. Gilmore*, 20 Kan. 551, 27 Am. Rep. 189; *Hughes v. Felton*, 11 Colo. 490, 19 Pac. 444; *People ex rel. Drake v. Mahaney*, 13 Mich. 493; 8 Fed. Stat. Anno. 322; *Peabody v. Boston School Committee*, 115 Mass. 383; *People ex rel. Cooley v. Fitzgerald*, 41 Mich. 2, 2 N. W. 179; *Com. ex rel. McCurdy v. Leech*, 44 Pa. 332.

The statute relates to the act of holding the election; not to an act which cannot be done until after the election has been held,—the contest. *Treat v. Morris*, 25 S. D. 615, 127 N. W. 554.

Sections 2665 and 2746, Rev. Codes 1905, when interpreted together, sustain the respondent's contention—as do the following cases: *Linegar v. Rittenhouse*, 94 Ill. 208; *Winter v. Thistlewood*, 101 Ill. 450; *Foley v. Tyler*, 161 Ill. 167, 43 N. E. 845; *Booth v. Arapahoe County Ct.* 18 Colo. 561, 33 Pac. 581; Colo. Const. art. 7, § 12.

This case is not here for trial *de novo* as in an equity case, but the findings of the trial court must be affirmed if there is any evidence to support them, the same as the verdict of a jury. *State ex rel. Brady v. Bates*, 102 Minn. 104, 112 N. W. 1026, 12 Ann. Cas. 105; Sec. 20, Corrupt Practice Act, chap. 129, Sess. Laws 1911.

The Corrupt Practice Act should be strictly construed. *State ex rel. Crow v. Bland*, 144 Mo. 534, 41 L.R.A. 297, 46 S. W. 440.

One's residence is where he remains when not called elsewhere for labor or other special or temporary purposes, and to which he looks and returns, in seasons of repose. There can be but one residence. *Smith v. Thomas*, 6 Cal. Unrep. 976, 52 Pac. 1079, 121 Cal. 533, 54 Pac. 71; *Moffett v. Hill*, 131 Ill. 239, 22 N. E. 821; *Carter v. Putnam*, 141 Ill. 133, 30 N. E. 681; *Welsh v. Shumway*, 232 Ill. 77, 83 N. E. 549; *West v. Sloan*, 238 Ill. 335, 87 N. E. 323; *Collier v. Anlicker*,

189 Ill. 46, 59 N. E. 615; *Langhammer v. Munter*, 80 Md. 518, 27 L.R.A. 330, 31 Atl. 300; *Chew v. Wilson*, 93 Md. 196, 48 Atl. 708; *Turner v. Crosby*, 85 Md. 178, 36 Atl. 760; *Erwin v. Benton*, 120 Ky. 536, 87 S. W. 291, 9 Ann. Cas. 264; *Stewart v. Wurts*, 143 Ky. 39, 135 S. W. 434; *State v. Savre*, 129 Iowa, 122, 3 L.R.A.(N.S.) 455, 113 Am. St. Rep. 452, 105 N. W. 387; *Huston v. Anderson*, 145 Cal. 329, 78 Pac. 626; *State ex rel. Hodges v. Joyce*, 128 La. 434, 54 So. 932.

The *intention* of a person (voter) has largely to do with fixing his residence. *Moffett v. Hill*, 131 Ill. 239, 22 N. E. 821; *Carter v. Putnam*, 141 Ill. 133, 30 N. E. 681; *Welsh v. Shumway*, 232 Ill. 77, 83 N. E. 549.

But intent and act must unite. 10 Am. & Eng. Enc. Law, 2d ed. 599; *People v. Turpin*, 49 Colo. 234, 33 L.R.A.(N.S.) 766, 112 Pac. 539, Ann. Cas. 1912A, 724; *Smith v. Croom*, 7 Fla. 81; *State v. Minnick*, 15 Iowa, 126; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216, 5 N. W. 119; *Spurrier v. McLennan*, 115 Iowa, 461, 88 N. W. 1062; *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698; 15 Cyc. 438; *Schuman v. Sanderson*, 73 Ark. 187, 83 S. W. 940; *State ex rel. Morrill v. Massey*, 10 N. D. 154, 86 N. W. 225.

The findings of the court are entitled here to the same credit as is the verdict of a jury. 15 Cyc. 437; *Schuman v. Sanderson*, 73 Ark. 187, 83 S. W. 940; *Williams v. Buchanan*, 86 Ark. 259, 110 S. W. 1024; *Trafton v. Quinn*, 143 Cal. 469, 77 Pac. 164; *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708; *Vigil v. Garcia*, 36 Colo. 430, 87 Pac. 543; *Moorhead v. Arnold*, 73 Kan. 132, 84 Pac. 742; *McCormick v. Jester*, 53 Tex. Civ. App. 306, 115 S. W. 278; *Caulfield v. Bogle*, 2 Dak. 464, 11 N. W. 511; *Jasper v. Hazen*, 4 N. D. 4, 23 L.R.A. 58, 58 N. W. 454.

SPALDING, Ch. J. The plaintiff and defendant were rival candidates for election to the office of mayor of the city of Larimore in Grank Forks county, at the city election held April 7, 1913. The official canvass gave defendant 116 votes and plaintiff 113 votes. The plaintiff contested the election of the defendant on the grounds: (1) That illegal votes were cast for defendant by persons not qualified to vote; (2) that de-

fendant violated the corrupt practice act by inducing and persuading one Hetherington to vote on election day.

A trial was had, and resulted in a judgment in favor of the defendant, holding him the duly elected mayor of the city of Larimore. The learned trial court also held that it was without jurisdiction to hear, try, and determine the contest proceeding.

1. The first question is whether the provisions of our statute relating to contested elections of county and other officers are applicable to a contest over the office of mayor of a city. If they have no application to that office, then the district court is without jurisdiction in the premises. The provisions for contests are found in §§ 688 et seq., Rev. Codes 1905.

The first reason alleged to sustain the decision of the trial court is that, because § 2660, Rev. Codes 1905, provides that "the city council shall be composed of the mayor and aldermen," and § 2665, that "the city council shall be judge of the election and qualifications of its own members," the mayor is a member of the city council, and that therefore that body is the exclusive judge of his election and qualifications. In this we are satisfied that counsel errs. The mayor is the chief executive officer of the city, § 2644. A vacancy in the office of mayor, if for more than a year, is filled by an election, if less than that period, by the city council, §§ 2645 and 2646. He presides at all meetings of the city council but has no vote except in case of a tie, when he gives the casting vote, § 2648. He has power to remove any officer appointed by him (§ 2649); is a peace officer, and has the same power within the city limits conferred upon sheriffs, to suppress disorder and keep the peace, § 2650. He performs such duties as are from time to time prescribed by law and by the city ordinances, and it is made his duty to take care that the laws and ordinances are faithfully executed, § 2652. He inspects records, gives information to the council relative to the affairs of the city, and makes recommendations for its consideration; may call upon each male inhabitant over eighteen years of age to aid in enforcing the laws and ordinances, and call out the Militia; is liable to prosecution criminally in any court of competent jurisdiction for omission of duty, or corruption or oppression, and for other derelictions, and is given the power to sign or veto any ordinance or resolution passed by the council, §§ 2653-2658.

These are among the general duties imposed upon him as the city's chief executive. His only duties in acting with the city council are to preside at its meetings and to have the casting vote in case of a tie. We are of the opinion that he is elected primarily as the executive officer of the city; that his membership in the city council, notwithstanding the statute, is only nominal; that under the provisions of the Code, his duties are defined, and are not enlarged by the statement of § 2660, that the city council is composed of the mayor and aldermen. It does not appear to us that he is a member of the city council in the sense meant by the provision of § 2665, making that body the judge of the election and qualifications of its own members. It is apparent to us that that only refers to the aldermen who are members of the city council.

Numerous authorities are cited by both appellant and respondent on these questions, but the great weight of authority seems to sustain our conclusions, and they are fortified by one decision at least of the supreme court of Illinois, from which state the provisions of our Code to which we have made reference, as well as many others relating to the government of cities, are copied, many sections *verbatim*, others with only verbal changes, while of course there are sections in the Illinois statute on the subject which are applicable to conditions existing in large cities, which were unnecessary to include in our Code, but which in no manner affect the proposition that our statute was taken from Illinois. It will be presumed that provisions so adopted were intended to carry with them the construction theretofore placed upon them by the courts of the state whence they came.

In *Winter v. Thistlewood*, decided in January, 1882, reported in 101 Ill. 450, the supreme court of Illinois had under consideration the question herein presented, and on the subject we are now considering it says: "The right conferred upon the council is only to judge of the election and qualification of its own members,—simply to determine who shall be a part of it and participate in its deliberations. No judicial powers are conferred upon it, and when it has denied one claiming to be a member the privilege of participating in its proceedings, it has done all that there is the slightest pretense it has any authority for doing. But the mayor is the chief executive officer of the city, and, independently of the council, in that capacity may exercise within the

city limits;" and here follows a list of many of the powers conferred upon mayors, when the court continues: "In none of these respects does the city council have any control over him, and in all of them he acts entirely independently of the common council and without the slightest reference to the question of his membership in that board. Indeed, except in case of a tie in the votes of the aldermen, when he is required to give the casting vote, his duties as a member of the council are more formal than substantial, being limited to merely presiding. It is to be borne in mind authority is not conferred upon the common council to be the judge of the election and qualification of the mayor, as it is to be presumed would have been, if such had been intended, but simply of its own members. We are clearly of opinion whatever power the common council may exercise in regard to the election and qualification of a mayor as affecting his membership of the council, it has no power to go beyond the letter of the statute and determine a contest between two rival candidates for the office of mayor. Even if it be conceded, which we do not, that the council may lawfully decline to allow the mayor to preside over its deliberations and give the casting vote in case of a tie on the ground that he is not elected and qualified, its power extends no further. In such case the power is given to the body to enable it to protect and purify itself, but neither principle nor analogy extends it any further."

Sections of the Illinois statute were under consideration in that case identical with §§ 2660 and 2665, *supra*, of our own Code. That case has not been overruled, and as to the power of the city council to determine a contest over the office of mayor, we think is controlling. Supporting this view, see also: *Cate v. Martin*, 70 N. H. 135, 48 L.R.A. 613, 46 Atl. 54; *Tiedeman, Mun. Corp.* § 96; *Martindale v. Palmer*, 52 Ind. 411; *Jacobs v. San Francisco*, 100 Cal. 121, 135, 34 Pac. 630; *Garside v. Cohoes*, 34 N. Y. S. R. 234, 12 N. Y. Supp. 192.

The New Hampshire court in *Cate v. Martin*, *supra*, remarks: "Applying the principles of these authorities, . . . the result is indubitably to established the proposition that, while the mayor is a constituent part of the aldermanic board for some special purposes, he sits and acts in the board, not in the capacity of an alderman, but in the capacity of *ex officio* presiding officer, and exercises those powers

only which have been specially committed to him as the chief executive of the city."

The authority given by § 2665 to the council, "to judge of the election and qualification of its members," corresponds to similar provisions in the Constitutions of nearly every state regarding membership in their legislative bodies, and also to a provision in the Federal Constitution; but we do not understand that it has ever been held or contended that such provision gave jurisdiction to those legislative bodies to determine contests over the election of a lieutenant governor or a Vice President, yet, to all intents and purposes, they are as much members of the respective bodies over which they preside as is the mayor of a city in this state, even though no provision making a lieutenant governor or Vice President a member of the Senate may be found.

Our conclusion that the mayor is not a member of the city council in the sense meant by § 2665, *supra*, renders it unnecessary to determine the question discussed at considerable length in the briefs as to that provision being the sole method provided for contesting the election. On this subject, however, see the exhaustive note in 26 L.R.A. (N.S.) at page 207.

2. The next question involving the jurisdiction of the court requires us to determine whether any provision has been made by the legislature for a contest of the office of mayor of a city, that is to say, whether the general law relating to the contest of county officials applies to the office of mayor. We do not understand it to be questioned that a proceeding in the nature of *quo warranto* would be applicable, but that question is not before us, because it was not the method adopted by the appellant. An answer to this question necessitates a reference to our statute providing for election contests. Section 602, Rev. Codes 1905, provides that all elections for state, district, county, city, and ward, and other officers provided by law, shall hereafter be held and conducted in the manner prescribed in this chapter, except as otherwise specially provided by law. This section is followed by provisions regarding the holding and conduct of elections. Section 688 and the remaining sections of art. 13 of chap. 8 of the Political Code provided a method for contesting elections, and § 688 reads in part: "Any person claiming the right to hold an office, or any elector of the proper

county desiring to contest the validity of an election, or the right of any person declared duly elected to any office in such county, shall give notice. . . . ” Article 14 of chap. 30 of the Political Code provides for the holding of elections in cities, and § 2746 found in that article reads in part: “The manner of conducting voting at elections to be held under this chapter and contesting the same, the keeping of poll lists and canvassing the votes, shall be the same, as nearly as may be, as in the case of the election of county officers under the general laws. . . . ”

It is contended that this furnishes no provision by which a contest over the office of mayor of a city may be instituted and conducted in the courts. The respondent urges that the words, “the manner of contesting the same,” only apply to the method of procedure, and do not relate to the jurisdiction. We understand him to insist that the same methods of notice and statement of the grounds of contest, etc., must be employed, and that the contest is then heard by the city council, rather than by the district court. We are satisfied that this interpretation of the language employed is too narrow, that the manner referred to relates not only to the method of procedure, but to the body or court which shall hear and determine the contest. That such was the intent of the legislative assembly in enacting this question can hardly be open to doubt, in view of the provisions which we have heretofore in this opinion construed. It can hardly be possible that, if the legislature intended to provide a speedy method for determining a contest over any county office, it should have employed the language found, and still have meant to subject a contest over a mayoralty to the delays and difficulties incident to methods which a contest was intended to obviate. When § 2746 is read in connection with the provisions regarding contests in general, it is in perfect harmony therewith; and if the mayor is not a member of the city council in such sense as to make that body the judge of his election, § 2746 clearly does not give it jurisdiction to try a contest over that office, and, inasmuch as the only jurisdiction given by the contest statute is to the courts, it must include contests for mayor, otherwise its reference to that subject is without meaning.

Again, our conclusion is fortified by reference to the Illinois Statute and the case of *Winter v. Thistlewood*, 101 Ill. 450. We have

heretofore indicated that the provisions regarding city officials were largely taken from Illinois, and we find by inspection that § 2746 supra is also a copy of the corresponding provision in the Illinois statute.

Paragraph 58 of chap. 24, Starr & Curtis, Annotated Illinois Statutes, as far as material reads: "The manner of conducting and voting at elections to be held under this act, and contesting the same, the keeping of poll lists and canvassing the votes, shall be the same as nearly as may be, as in the case of the election of county officers under the general laws of this state."

Section 691, Rev. Codes 1905, gives the district court jurisdiction to try contests, and if the reference to contests found in § 2746 has any meaning whatever, it must be meant to apply to contests for mayor. While in Illinois there are some provisions regarding the filing of the notice and reply with the clerk of court, which are not specifically made by our legislature, we think they do not change the effect of the statute. It was held in the case cited that it seemed beyond controversy that the election of mayor being held under the general law relating to cities, etc., the manner "of contesting the same shall be the same as nearly as may be as in the case of county officers under the general laws of this state." This and the provision of the statute of Illinois giving the county court authority to hear and determine contests on county officers, corresponding to § 691, supra, rendered a contest over the mayoralty in county court proper.

We hold that the district court has jurisdiction to hear and determine such contests. See also *Treat v. Morris*, 25 S. D. 615, 127 N. W. 554; *Kadlec v. Pavik*, 9 N. D. 278, 83 N. W. 5.

3. Appellant next urges that the respondent was guilty of such violation of § 16 of chap. 129, Laws of 1911, known as the corrupt practices act, as to deprive him of the office of mayor under the provisions of § 19 of the same act. As far as material § 16, supra, reads: "It shall be unlawful for any person at any place on the day of any election to ask, solicit, or in any manner try to induce or persuade any voter on such election day to vote or refrain from voting for any candidate, or the candidates or ticket of any political party or organization, or any measure submitted to the people. . . ."

The record discloses that one Hetherington, claiming to be a qualified voter, went to the polls, and on being told that he was not entitled

to vote, he sought advice of an attorney; and then, in his own language, "I stopped in to see Mr. Gass, and told him that I had to swear my vote in; that I wanted him to go up and sign it up for me." Whereupon Gass went to the polling place and signed the statutory affidavit required of a voter who is challenged. He testified that he did not remember of Gass saying anything in the polling place while he was there. Gass testified that Mr. Bennett (one of the officials) asked a few questions of Mr. Hetherington about his residence, etc., about his household goods, and instructed the clerk to make out an affidavit, and after that was done he signed it.

Some of the officials testified that Gass gave instructions to Hetherington before he voted, by telling him to go and vote, that he was a legal voter, or something of that kind. Witnesses for the respondent testified that there was no conversation of this kind, but that after Hetherington had voted, different parties, including the respondent, got into a discussion over the qualifications of the voter. The trial court found that the defendant did not ask, solicit, or in any way try to induce or persuade any voter on said election day to vote or refrain from voting for any candidate or candidates, or ticket of any political party or organization, or any measure submitted to the people thereat. While there is a conflict as to exactly what took place and was said at the polls, there is sufficient evidence to sustain the finding of the trial court in defendant's favor, unless the mere fact that, after being requested to do so by Hetherington, Gass went to the polls with him to swear in his vote, constitutes a violation of the corrupt practices act, as equivalent to asking Hetherington to vote for defendant.

While we agree with the suggestion of counsel for appellant, that that act should be liberally construed with a view to its enforcement in the public interest and the purity of elections, and that the principle involved in the law is salutary, yet we cannot agree with him that the act of the defendant was a violation of the statute. It would be so harsh a construction of the law as to render any person who assists a voter in casting his ballot, liable to prosecution under the terms of the act, and this certainly could not have been contemplated by the legislature. No solicitation by Gass is shown; on the contrary, Hetherington was the one who solicited him, and he exercised his prerogative, as a citizen, to aid another citizen in casting his ballot; and we think

this act, at least as testified to by him, and which, in view of the finding of the trial court, must govern, does not come within either the spirit or the letter of the statute.

4. The next and serious question in this case is as to the legality of the votes cast by R. L. Rowe, George R. Hetherington, John McIntyre, and A. Hooks.

The trial court found that one J. C. Murphy did not vote in the precinct of his residence. This reduced the vote of the contestee to 115, leaving him two majority over the contestant.

Hetherington voted in the first ward, where he swore in his vote. The affidavit on which he voted was verified by the contestee, and stated his residence to be with J. E. Hetherington, in the first ward. On the trial he testified that his residence was at the Salvation Army barracks, also in the first ward. It seems that the residence referred to was that of his son. The record shows that Hetherington worked most of the time from the spring of 1912 out of town on the Hersey farm, and both boarded and roomed there, except at times when he came to town. He testified that he may have been to town once a month, and that the winter before the election he was absent from town three months at one time; that part of his personal effects were at his son's and part at the barracks; that when he came to town he slept at the barracks, where he had the use of a room in which he had a stove and cooking utensils, bed and clothing; that he had a lock and key to the room and that he paid nothing for its use; that he was not at the barracks between November and the election; that originally there was a partition between his room and the Salvation Army hall, but that that partition had been torn down and removed, so that he had no longer any private room; that the year before he had been sick and then stayed at his son's. He testified that he had lived in Larimore since the fall of 1892, and during all that time voted in the city and in the first ward since the spring of 1893, and that he claimed the barracks as his home, and returned there when not engaged on some temporary employment elsewhere, and had no other home.

The question of the residence of farm laborers, who have no family and who work from place to place, for the purpose of voting, is often a difficult question, and each case must be determined upon its own facts. Much depends upon the intent of the party, but the intent must

be accompanied by an act or acts, to establish or retain a residence. While it is possible that Hetherington might have voted at the Hersey precinct, had he declared that to be his home, and that he considered it as such and intended to continue to make it his home, yet the record does not show that he attempted to vote there at any time, or that he considered it as his home, or that, if he was out of employment, he would remain there. Notwithstanding the fact that he gives no explanation of how he happened to make affidavit that he resided at his son's, and that, when he first approached the polls, he informed the election officers that he had not resided in Larimore since the preceding November, we think his testimony, taken *in toto*, warrants the inference that his meaning, in making such statement, was that he had not been there or stayed there since the preceding November. We grant that there is much force in the argument made by counsel for appellant to show that the trial court erred, but we think there is sufficient evidence to sustain the finding.

5. The next vote challenged is that of one McIntyre, a single man, who voted for Gass. He had lived around Larimore about four or five years, but, commencing in the fall of 1912, he had worked for one Purcell, about 12 miles out of Larimore, and continued to do so until the 29th of March, 1913, and about the 8th or 9th of April he engaged to work in the country for Mr. Steadman, where he still remains. He testified that when he went to town, he usually stayed at the place of one Prevost, but that from the time he commenced to work for Purcell he had neither room nor board at Prevost's place, and was not there, although he stayed in Larimore a few days; that he was not related to Prevost. He had lived in Grand Forks county since coming to the state about ten years, except one winter, and had lived in Logan township southwest of Larimore, and left that township and went to Larimore about the 1st of November, 1912. He testified, however, that his only home had been at Prevost's for three years; that he had been there three weeks when he went to Purcell's; that he came in just before Christmas and went to Prevost's place one day; that a portion of his clothes remained at Prevost's; that he went to Prevost's when he finished any job of work; that he paid Prevost for his board and lodging when there; that, if he remembered right, he had left his good clothes at Prevost's to save bother carrying them around; that, at the time of the

trial, he had an overcoat at Prevost's. Purcell testified that McIntyre worked for him from the middle of November until the last of March; was only away part of one day. Prevost testified that, while McIntyre worked for Purcell, he had most of his stuff with him, and that any that was left was as an accommodation, and no charge was made for storing it; that McIntyre did not keep a room there when absent, and had no trunk there. McIntyre testified that he did not vote in the 1910 general election, but the poll book of Logan township for that election was offered in evidence, showing that John A. McIntyre voted.

He was a farm laborer, and we think it apparent that he did not have a permanent residence in Larimore, and that he carried his residence with him. So far as the intent covers, it is, of course, easy for this class of men to testify as to their intent, and make it apply to any place where they stop for either a short or a long period. There is a marked distinction between McIntyre's case and Hetherington's. Hetherington had for many years made Larimore his home, and had a room and furniture in the city. But there is nothing in McIntyre's case to show that he intended making it his home, further than to enable him to vote on this occasion. He left nothing of sufficient importance to call for his return to Larimore, had it been more convenient for him to have taken his departure from another place. His vote in Logan township negatives the fact that he had considered Larimore as home during the three years, and the fact of the very brief stays made by this man in Larimore and his leaving no trunk at Prevost's and no belongings of sufficient importance to call him back there if inconvenient to go, the extent of his stay at Purcell's place, and his voting in Logan township, are quite persuasive that he, in fact, had no residence except where he was employed. On the record his residence was at Prevost's while he lived there, and no longer. If his vote is legal, then any farm laborer who, in seeking employment, stops at a city for a few days until he finds employment in the country, and on holidays or other convenient occasions goes into town for business or pleasure, may claim the city as his residence for voting purposes. It was not the intention of the Constitution makers who prescribed the qualifications of an elector to permit transients and floaters to vote in a place where they make an occasional stop but where there is no tangible evidence

of a permanent residence. Authorities holding that one domicile is retained until another is established are not applicable to the question of residence of a party claiming to be entitled to vote. For voting purposes a man may be a resident of the state, yet, by reason of having changed his residence from one county to another, lose his right to vote, and the same is true with reference to a change of precincts.

6. The next vote challenged is that of one A. Hooks. He was a single man and a farm laborer by occupation. He testified that he had no particular headquarters in Larimore except that it was the place where he worked, which had been for Pat McMahon and Ole Kalness; that he voted in the third ward, in which McMahon lived; said that he had claimed that place as his home for the past two years. During the summer of 1912 he worked for one Heine in the country, and had his effects with him. In September, 1912, he came into town and worked and slept on McMahon's farm adjoining the city, where he kept his trunk and things, but took his meals in town. He had no room in the house in town. After quitting work for McMahon about the 1st of February, 1913, less than ninety days before this election, he went to work in the country for McLain, and worked for him until the 28th of March, when he went into town for three days and stayed at a hotel in the second ward. He hired out to one Kalness on quitting McLain, and worked for him one day, when he again hired to McMahon. He had not lived in the ward where he voted for ninety days next preceding the election, and had had no room there or any of the indicia of a home.

It is clear from the testimony of Hooks that he had no home except where he worked. The facts show that he did not regard McMahon's city place as his home, except when he was working for him, and then he in fact lived and slept outside the limits of Larimore. It is not pretended that he went to McMahon's when he came into town for a day or two. On such occasions he stayed at a hotel in another ward. This is wholly inconsistent with the claim of residence at McMahon's. He voted for Gass.

7. The next vote challenged is that of one Rowe. There is a clear distinction between his case and those of Hooks and McIntyre. He had worked for Pifer since June, 1912, and went wherever Pifer sent his gang of men, but, between trips or completing one job and com-

mencing another, always returned to Pifer's place, in Larimore, except on one or two occasions when Pifer's bunk house was not in condition for lodgers, and Pifer sent him to a hotel and paid his bill until the bunk house was ready for occupancy. He was a resident of Larimore for the same reason that McIntyre and Hooks were not residents of that city.

8. Testimony was taken regarding the qualifications of several other persons who voted, but as there is no reference made to them in the brief of appellant, it must be held that he has abandoned any claims of illegality as to their votes. Certain other errors are assigned, but we find them unimportant in view of our conclusions.

9. In general, regarding the residence of voters, we may call attention to the provisions of the Constitution requiring one to have resided in the state one year, in the county six months, and in the precinct ninety days, next preceding an election, to qualify him to vote. § 121 and § 2744, Rev. Codes 1905, as amended by chap. 66, Laws of 1911. This latter section provides that "every legal voter of the county, in which such city is situated, who shall have been a resident of the city ninety days next preceding a city election, is declared a citizen of said city, and shall be entitled to vote at all city elections," but only in the ward or precinct where he resides. A good-faith intent of a voter to make a place his home for all purposes is one essential element entering into the determination of the question of residence; and a domicil once gained does not continue until a new one is acquired, for voting purposes; nor does a right to vote at a particular poll or district continue until the right to vote elsewhere is shown, but the shortest absence coincident with an intention to change the residence defeats the right to vote at the former domicil. *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232.

The place of one's residence for the purpose of voting is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. *Berry v. Wilcox*, 44 Neb. 82, 62 N. W. 249, and note in 48 Am. St. Rep. 712. The question of residence must be determined from all the facts and circumstances surrounding the person, as related to his residence, and the intention must be accompanied by acts in harmony with the declared intention; and notwithstanding one may testify that his intention was to

make his home in a certain place, if his acts are of a character to negative his declaration or inconsistent with it, it is clear that the court cannot be governed by his testimony as to intention.

In harmony with our views we quote briefly from *State v. Savre*, 129 Iowa, 122, 3 L.R.A.(N.S.) 455, 113 Am. St. Rep. 452, 105 N. W. 387: "A person cannot live in one place, and by force of imagination constitute some other his place of abode. The intent and the fact, as already stated, must concur. . . . The home of an unmarried man is where he has his rooms, in which he keeps such personal effects as he has, where he rests when not at work, and spends his evenings and Sundays." In that case, a party testified that he intended to make his home at a place where he took his meals, but, as he slept in another place, the court held that his testimony as to intention was disproved by the fact that his actual place of residence was controlling, and that he could not improvise one by merely forming an intention to claim it elsewhere. This especially applies to *McIntyre*.

See also *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205, 69 N. E. 905; *Gardner v. Board of Education*, 5 Dak. 259, 38 N. W. 433; *People v. Ellenbogen*, 114 App. Div. 182, 99 N. Y. Supp. 897; *Frost v. Brisbin*, 19 Wend. 11, 32 Am. Dec. 423; *White v. Slama*, 89 Neb. 65, 130 N. W. 978, Ann. Cas. 1912C, 518. In *Widmayer v. Davis*, 231 Ill. 42, 83 N. E. 88, it was held that a man who lived for a year or more in a ward, but prior to an election moved away, and left clothing and kept the key of the house in which he had lived, so he might be entitled to vote, was not a qualified voter.

Our conclusion is that each candidate received 113 votes, and that therefore there was no election of mayor. The judgment of the trial court is vacated, and it will enter a judgment in accordance herewith, and directing the parties to proceed in accordance with the provisions of § 2747, Rev. Codes 1905, for the determination by lot of who shall hold the office of mayor in case of a tie. *Howser v. Pepper*, 8 N. D. 484. Appellants will recover costs.

T. G. SAUNDERS v. BOARD OF COUNTY COMMISSIONERS
in and for Dunn County, and Paul Ziner, W. L. Beattie, E. J.
Pletan, as Members of said Board of County Commissioners.

(146 N. W. 907.)

Stock running at large — districts — creation — county commissioners — exclusive power — vote of people — relates merely to time — question — how submitted — by commissioners — by petition.

Chapter 178 of the Laws of 1913, which provides for the creation of districts in which stock may run at large during certain seasons of the year, vests in the boards of county commissioners of the several counties the exclusive power and the exclusive discretion as to the creation and boundaries of said districts. The portion of the act which relates to a submission to a vote of the people relates merely to the periods of the year during which stock may be permitted to run at large within such districts as may have been designated by the commissioners, and not to the nature and extent of such districts. This question of when stock may run at large may be submitted to the people, either by the commissioners on their own motion or after they have been petitioned to submit the same by one fourth of the electors in any one of the districts previously determined and designated by the board of county commissioners.

Opinion filed April 1, 1914.

Appeal from the District Court of Dunn County, *Crawford, J.*

Application for a writ of mandamus. Judgment for defendants.

Plaintiff appeals.

Affirmed.

Statement by BRUCE, J.

This is an appeal from an order and judgment denying a writ of mandamus. The affidavit for the writ was as follows:

T. G. Saunders, being first duly sworn, deposes and says that he is a resident, freeholder, and legal voter in the district hereinafter described in Dunn county, North Dakota, and on or about the 1st day of July, 1913, joined with twenty-nine other legal voters of said district in a petition to the county board within and for the county of Dunn, in the state of North Dakota, said thirty (30) petitioners comprising

more than one fourth of the legal voters polled at the general election last held, therein asking that stock be allowed to run at large from the date of the petition until next general election; that such petition was filed with the county auditor on or about the 1st day of July, 1913; and the district covered by such petition is as follows: Township 147 north of range 96 west; township 148 north of range 96 west; township 146 north of range 97 west; township 147 north of range 97 west; and township 148 north of range 97 west; that such petition was made to in every manner conform with chapter 178 of the Session Laws of North Dakota for 1913; that Dunn county is a duly and regularly organized county of the state of North Dakota, Paul Ziner, W. L. Beattie, and E. J. Pletan are the duly and regularly elected, qualified, and acting county commissioners comprising the board of county commissioners within and for the said county of Dunn; that on the seventh (7) day of July, 1913, the board of county commissioners, within and for the said county of Dunn, met and, among other things, considered the petition above referred to, and then and there refused, and still refuses, to declare by resolution that stock may run at large within the limits of said district, between the dates named in said petition, to the great damage of deponent and the other petitioners who are similarly situated with deponent; that deponent and such other petitioners have no speedy or adequate remedy at law; that this affidavit is made for the purpose of procuring an alternative writ of mandamus compelling the county board of Dunn county, and the members comprising same, the above defendants, to meet and pass a resolution authorizing and allowing stock to run at large within the limits of the above-described district up to the time the result of the votes on such proposition is determined at the next general election; and further enjoining and compelling the said board of county commissioners to submit the question as to whether or not stock may be allowed to run at large in the above-described district at the next general election, or to show cause why the same has not been done before this court at a time and place to be stated in said writ.

On this affidavit or petition an alternative writ of mandamus was granted, but later and on hearing was quashed by the trial court.

Casey & Burgeson, of Dickinson, North Dakota, for plaintiff and appellant.

W. A. Carns and *Alf O. Nelson*, of Manning, North Dakota, and *F. E. McCurdy*, of Bismarck, North Dakota, for defendants and respondents.

BRUCE, J. (after stating the facts as above). Sections 1933, 1934, 1935, 1936, 1937, and 1938 of the Revised Codes of 1905, which chapter 178 of the Laws of 1913 amended, made it lawful for stock to run at large from the 1st day of December until the 1st day of April. They, however, provided that "the board of county commissioners of any county shall, whenever they deem it advisable, vote upon the question of abolishing the provisions of this article in such county.

. . . Whenever the county commissioners shall have voted it is unlawful for stock to run at large, then at the next general election or at any other time this question shall be submitted to a vote of the people, and the order of the board of county commissioners for such election shall be made at least sixty days before such election, . . ."

The act now before us (chapter 178 of the Laws of 1913) makes the running at large at any time unlawful except as provided for in the act. It first provides that the board of county commissioners *shall establish* stock districts, "including all the territory within the county." These districts may comprise a part or the whole of a county, that is to say, the commissioners may divide the county into a number of districts or into one. It then provides that "if one fourth of the electors of *any such* district, as determined by the whole number of votes polled at the general election last held therein, shall file a petition in the office of the county auditor asking that stock be permitted to run at large *between certain dates* specified in such petition, and that the question of permitting stock to run at large in such district *between such dates* be submitted to the voters of *such district* at the next general election, it shall be the duty of the board [of county commissioners], within ten days thereafter, at a regular or special meeting, to declare by resolution that stock may run at large *within the limits of said district* between the dates named in said petition. . . . Said resolution shall state the date of its taking effect, and shall be effective to permit stock to run at large between said dates from and after the date specified in said resolution until said proposition shall have been voted upon by the

electors of said district. *Provided that the board of county commissioners may, at any regular or special meeting, when it is deemed advisable, adopt the resolution herein authorized without being first petitioned so to do.*" The act further provides that "whenever it shall have been declared lawful for stock to run at large within a certain district between specified dates, then, at the next general election, but at no other time, said question shall be submitted to a vote of the electors of said district."

It is clear to us that the first thing requisite is the setting apart of the districts. After that is done, but not until it is done, the board of county commissioners may, at their own motion, fix the time in which stock may run at large within the districts determined upon by them, and may submit the question to a vote of the people, or, having first designated the districts, they may wait until one fourth of the electors of any such district specify the dates and ask that the question be submitted.

In the case at bar, it appears that on the 1st day of July, 1913, thirty electors agreed among themselves upon a certain area, and, being one fourth of the whole number of voters therein, petitioned the county commissioners to create said area a district, and to allow stock to run at large therein until the question should be submitted to the voters at the general election. This the commissioners refused to do, and in its place and on the 7th day of July, passed a resolution by which they themselves created a stock district, comprising the whole of Dunn county, and designated that stock might run at large therein from the 1st to the 15th of January.

This action of the board was clearly within the provisions of § 1934 of chapter 178 of the Laws of 1905. The boards of county commissioners have the powers but no other powers than those granted by the act. They have no other duties except those provided for in the act. The creation of the district, whether it should comprise the whole county or a part of the county, was vested by the statute in their sole discretion, and there is no requirement that the nature or extent of the districts shall be submitted to a vote of the people, or shall arise from and be based upon a petition.

The statute nowhere gives to the electors the power to designate the districts or to vote thereon. This is intrusted entirely to the discretion

of the commissioners. All that the statute provides is that *after* a district is designated, then the electors may petition that stock may be allowed to run at large *therein* during certain dates, and that *this question of dates* may be submitted to a vote of the people.

On July 1st no district had been created, and there was therefore no warrant whatever for the petition, and it is therefore quite clear that there was no warrant for the mandamus proceedings. There was, in short, no duty resting upon the commissioners which mandamus could enforce. It is equally clear that the resolution passed by the commissioners on the 7th day of July, 1913, was within the power of such commissioners. The statute provides that the district may be made to comprise the whole county, and it further provides "that the board of county commissioners may at any regular or special meeting, when it is deemed advisable, adopt the resolution herein authorized without being first petitioned so to do." It provides in short that, without a petition, the commissioners shall set aside a district or districts, may designate the time within which stock may be allowed to run at large therein, and may submit the question to a vote of the people.

The judgment of the District Court is affirmed.

THOMAS H. OKSENDAHL, as Administrator of the Estate of Tonnes Jacobson, Deceased, Ole Peterson, as Guardian of Vera Vanstrom, and Theodore Jacobson et al. v. ANNA M. HALES et al.

(146 N. W. 545.)

Abstract and brief — filing — delay — filing of record — commencement of term — after — no excuse shown — remissness — appeal — dismissal.

Delay by appellant in filing abstract and brief until after the commencement of the second term of this court following the filing of the record, and other delays, as stated in the opinion, none of which are attempted to be excused, are *held* to show such remissness in prosecuting this appeal as to require its dismissal.

Opinion filed April 7, 1914.

Appeal from the District Court of Pierce County, *Honorable J. F. Cowan, J.*

Appeal dismissed.

P. J. McClory, of Devils Lake, for appellants.

C. L. Young, of Bismarck, North Dakota, for appellants, on motion to dismiss.

L. R. Nostdal, of Rugby, North Dakota, for respondents.

SPALDING, Ch. J. This action involves the N. E. $\frac{1}{4}$ —7—156—72 in Pierce county. Judgment was entered in the district court of that county, awarding the possession thereof to respondent Oksendahl as administrator of the estate of Tonnos Jacobson, deceased, and holding that it belonged to the estate of said Jacobson, free from certain claims of appellants, on the 13th day of August, 1912. An appeal to this court from such judgment was perfected about September 20, 1912. Nothing further was done by appellants until July 19, 1913, when an *ex parte* order was obtained from the district court of Pierce county, extending until August 18, 1913, the time for appellant to prepare and serve a statement of the case.

The statement of the case was served July 30, 1913, and on September 1, 1913, one day before the September, 1913, term, the record was filed in this court, and the case was placed upon the calendar of the December, 1913, term.

A motion to dismiss the appeal for failure to file abstract and brief and to prosecute the appeal was made and denied at that term. Appellants, however, did nothing toward prosecuting the appeal for ten days after the opening of the March term of this court, when their abstract was filed, and on the 14th it was followed by a brief.

In the meantime respondents noticed a motion to dismiss setting forth the facts claimed to show wilful and prejudicial delay in the prosecution, and tending to show a deliberate purpose on the part of appellants by such delay to retain possession of the premises in question through the cropping season of 1914, in fact, proof is offered of statements made by one of the appellants, indicating that the delay had been made with that purpose in view.

Appellants have filed no affidavits in opposition to the motion, and do not explain or excuse their delay.

The rules of this court in effect until September 1, 1913, required abstracts and briefs of appellants in civil cases to be served and filed not less than twenty-five days before the first day of the term at which the case might be heard, and provided that a failure to comply with the rule should be cause for the dismissal of an appeal, and the rules taking effect September 1, 1913, made delay in causing a settlement of a statement of the case, and in the transmission of the record and in other particulars, ground for dismissal, in the absence of excuse.

The motion made at the opening of the December term was sufficient to apprise appellants that respondents were alert in protecting their interests, and we discover no excuse for delay after that time and until another term commenced.

The record before us taken as a whole cannot fail to impress an impartial party with the fact that the delay in the various steps taken has been deliberate and inexcusable.

At the hearing of the motion to dismiss, attorneys appeared who had not been connected with the case before, and they have been furnished with nothing to excuse appellants' remissness. This court has been extremely lenient with appellants in such matters, and by doing so has added greatly to its labors and to the postponement of decisions in litigation in which parties act promptly, but this furnishes no reason for tolerating unexcused and inexcusable failure to prosecute in the case at bar.

We may add that, after our decision dismissing this appeal was announced, new counsel, in addition to the many who have acted for the appellants in the different stages of this litigation which has been in the courts for twelve years or more, appeared and requested us to reconsider our order of dismissal. Whereupon, and with a desire to avoid doing possible injustice, the several members of this court made a complete and thorough examination of the entire record, and reached the conclusion that a hearing on the merits could avail appellants nothing.

The motion to dismiss is granted.

T. F. MURTHA v. BIG BEND LAND COMPANY, a Foreign Corporation.

(147 N. W. 97.)

Default judgment — order relieving from — appeal from order — discretion.

On an appeal from an order relieving defendant from a default judgment and permitting a defense to be interposed, *held*, under the record of facts, that the trial court in granting such relief did not abuse the discretion vested in it in such cases.

Appellant's contentions that defendant's showing as to a meritorious defense, and that the default occurred through "inadvertence, surprise, or excusable neglect" within the meaning of § 6884, Rev. Codes 1905, *held untenable*.

Opinion filed April 9, 1914.

Appeal from District Court, Stark County, *W. C. Crawford, J.*

From an order vacating a default judgment and permitting defendant to answer upon the merits, plaintiff appeals.

Affirmed.

T. F. Murtha, for appellant.

The discretion referred to in such cases is not a mental discretion, but a *legal* one, to be exercised within the law. It is the duty of courts to follow the intent and spirit of the law, and not simply to give effect to the *will* of the judge. *Tripp v. Cook*, 26 Wend. 152.

A meritorious defense must also be shown, as well as surprise, inadvertence, or excusable neglect. *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228.

The defense must be set out in particular, and the general allegation that defendant has been advised by his attorney that he has a good defense is not sufficient. *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; 23 Cyc. 955-958; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Kirschner v. Kirschner*, 7 N. D. 292, 75 N. W. 252; 23 Cyc. 931, note 36; *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

No relief can be had for a mistake of law. *Keenan v. Daniells*, 18 S. D. 102, 99 N. W. 853; 23 Cyc. 931, note 35.

The evidence offered in support of the judgment fully overcomes the showing made to reopen. 23 Cyc. 958; *Wheeler v. Castor*, supra. *W. F. Burnett*, for respondent.

In motions of this character, the trial court exercises powers of a court of equity. Unless there appears a plain, clear abuse of its discretion, the appellate court will not interfere. *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Keeney v. Fargo*, 14 N. D. 419, 105 N. W. 92; *Olson v. Sargent County*, 15 N. D. 146, 107 N. W. 43; *Colean Mfg. Co. v. Feckler*, 16 N. D. 227, 112 N. W. 993; *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Courts have and possess a broad discretion in such cases. *Colean Mfg. Co. v. Feckler*, 16 N. D. 227, 112 N. W. 993.

Fisk, J. Plaintiff appeals from an order made by the district court of Stark county on September 13, 1912, vacating a default judgment entered in appellant's favor on August 3, 1912, for \$1,586. It is appellant's contention that the district court committed a manifest abuse of discretion in making the order complained of. He contends, in other words, that defendant's showing was wholly insufficient: First, "because the affidavits and answers do not make a proper showing of merits;" and, second, "the defendant wholly fails to show that the judgment was taken against it through its mistake, inadvertence, surprise, or excusable neglect."

The record discloses that the defendant is a foreign corporation, and the summons and complaint were served upon the secretary of state on July 2, 1912, who admitted service and forwarded the papers to defendant in the state of Wisconsin. The cause of action set forth in the complaint is based upon an alleged employment by defendant of the plaintiff, and also of the firm of McFarlane & Murtha, lawyers, of which firm plaintiff was a member, in handling certain litigation involving lands in Dunn county, and for certain advances made by such attorneys in connection with such litigation. At the hearing of the motion to vacate the default judgment, defendant tendered a proposed answer to the complaint, consisting of a general denial, which proposed answer was verified by its attorney, Burnett, upon information and

belief. It also produced the affidavits of Geo. Dow, Robe Dow, Rufus B. Smith, and W. F. Burnett. The substance of these affidavits is set forth in appellant's brief as follows:

"The affidavit of George Dow sets forth in substance that he is the president of the defendant company, and one of its directors; that nearly all of its business is transacted from the city of Stoughton, Wisconsin; that the summons and complaint in said action were sent by mail by the secretary of state of North Dakota, in a letter dated July 2, 1912, addressed to defendant at Madison, Wisconsin; that the letter and summons and complaint were received by the defendant on the 9th day of July, 1912, and that on that day the affiant with Robe Dow, another of its directors, called upon Attorney Rufus B. Smith, at Madison, Wisconsin, who then had charge of some other litigation for defendant, and stated its defense to said Smith, and that said company desired to defend the said action, and were informed by said Smith that he could not appear in the courts of North Dakota, and that it was necessary to retain an attorney in North Dakota for the purpose of interposing an answer; that he is informed and believes that on the 15th day of July, 1912, the said Smith telegraphed W. F. Burnett, an attorney at Dickinson, North Dakota, and received an answer by wire from said Burnett on July 16th, stating that he would defend said action; that thereafter the said Smith wrote a letter to said Burnett, retaining him to defend said action; that affiant is informed and believes that said Smith wrote said Burnett, retaining said Burnett to defend said action, and positively that on the 6th day of August defendant received a letter from Burnett stating that an answer had been interposed. On the 10th day of August it received a letter from Burnett, stating that the answer had not been accepted and judgment in said action had been entered. That defendant had no knowledge or information that there had been any failure on the part of anyone to interpose an answer until the receipt of the letter from Burnett about August 10th.

"The affidavit further states that defendant has a full and complete defense on the merits to the whole of plaintiff's claim in this action; that the action is brought to recover the sum of \$2,566.25 for legal services and disbursements; that the defendant is not in any manner indebted to plaintiff in any sum whatever; that the defendant never

retained the plaintiff or employed him in any manner whatever, or in relation to any matter whatever, and no officer of the defendant company ever retained or employed said plaintiff, and that the defendant fully and freely stated the case to its counsel, Rufus B. Smith, and that it has a full and complete defense on the merits to the whole of plaintiff's claim, as it is advised by its counsel and verily believes; and further says that at the direction of said defendant the case has been fully and freely stated to W. F. Burnett, and is advised by said Burnett that it has a full and complete defense on the merits to the whole of plaintiff's claim.

"The affidavit of Robe Dow is to the effect that as far as he knows or can ascertain the defendant never employed the plaintiff, T. F. Murtha, in any manner whatever to perform any services for it.

"The affidavit of Rufus B. Smith is to the effect that he is an attorney at law, residing at Madison, Wisconsin, and has been the attorney of the defendant in other matters; that on the 9th day of July, 1912, he was consulted by George Dow, president, and by one of the directors of the defendant company, in relation to this action; that he was then informed by the president and director that said defendant never employed plaintiff and never retained him, and that plaintiff had never performed any service for said defendant; that affiant informed the said president that it would be impossible for affiant to appear in the district court of Stark county, North Dakota, and that it would be necessary to employ an attorney in North Dakota to interpose an answer and make proper defense; that on the 9th day of July, affiant wrote plaintiff, asking how long the defendant had to answer, and on the 13th day of July affiant received a letter from plaintiff in which plaintiff stated that defendant had thirty days from the time of the service of the papers on the secretary of state; that affiant, in the hurry and press of business, hurriedly read said letter, and obtained therefrom the impression that there were thirty days still left for the defendant to answer; that the affiant retained W. F. Burnett, of Dickinson, North Dakota, and wrote to the said Burnett that the affiant understood that the last day for answering was August 10th; that affiant supposed everything had been done that was necessary, until the receipt of a letter from Burnett informing the affiant that the answers

were too late; that the affiant had advised defendant that it had a full and complete defense on the merits to the plaintiff's claim.

"The three foregoing affidavits were sworn to on the 24th day of August, 1912, at Madison, Wisconsin.

"The affidavit of W. F. Burnett, sworn to August 29th, is to the effect that on or about the 16th day of July, 1912, he received a letter from Rufus B. Smith, retaining said Burnett to appear on behalf of the defendant in the above-entitled action, and in that letter said Rufus B. Smith advised Burnett that the time for answering would expire on August 10th (Smith only wrote that he understood that August 10th was the last day); that affiant relied on said information; and further states that he received no information from plaintiff or anyone else, as to when the time for answering expired, other than the information received in said letter from Smith. That on the 6th day of August, 1912, affiant attempted to serve on the attorney for plaintiff a copy of the defendant's answer; and was then informed that judgment had been entered through inadvertence and mistake of affiant and defendant (without particularizing except as above); and further states that the said defendant fully and freely stated the case to affiant, and he believed that defendant has a good and meritorious defense to said action. This affidavit was made before the affidavits of Murtha and Sturgeon."

This showing as to the existence of a meritorious defense is, we think, amply sufficient. Indeed, its sufficiency is challenged solely upon an erroneous assumption as to the cause of action alleged in the complaint. Appellant assumes that the complaint merely alleges an employment by defendant of the firm of McFarlane & Murtha, under which employment such firm of attorneys performed certain professional services and expended certain moneys in defendant's behalf; that such services were reasonably worth the sum of \$2,500, and that the account of said firm for such services and disbursements was assigned to this plaintiff. This is an entirely erroneous assumption as disclosed by a reading of the complaint. Such complaint, in fact, alleges two causes of action: First, for services and moneys expended by the firm of McFarlane & Murtha under an employment by defendant between January 1, 1909, and August 15, 1910; and, second, for services and moneys expended by plaintiff, Murtha, between August 15, 1910 (the date of the alleged dissolution of the copartnership of Mc-

Farlane & Murtha), and June 15, 1912, under an alleged employment of him by defendant. The value of the services alleged to have been performed by the firm and by the plaintiff individually is not separately stated. It is thus apparent that appellant's first contention is predicated upon an erroneous premise, no doubt caused through oversight or inadvertence. We are not called upon, therefore, to decide what the ruling would have been had the complaint been as appellant assumes it to be. Appellant's first contention must be overruled.

Was the showing that defendant's default was caused through its mistake, inadvertence, surprise, or excusable neglect sufficient to warrant the lower court in relieving it from such default? We must answer this question in the affirmative. As repeatedly held by us, the ruling of the trial court in relieving a party from default will not be disturbed on appeal, except in case of a clear abuse of discretion. Under the showing we are unwilling to hold that there was an abuse of discretion. It is apparent that defendant claimed to have a meritorious defense and in good faith intended to interpose such defense. It acted promptly in employing counsel, to whom its officers made a full statement of the facts claimed to constitute its defense. Its counsel in Wisconsin wrote to plaintiff immediately upon being retained, to ascertain how much time was allowed defendant to answer, and received a reply four days later, stating that it had thirty days from the time of the service of the papers on the secretary of state; and the Wisconsin counsel, in his affidavit, states that in the hurry and press of business he hurriedly read the letter, and obtained therefrom the impression that there was thirty days still left in which to make answer. Thereupon, acting for the defendant, he retained W. F. Burnett of Dickinson to defend such action, stating in a letter to Burnett that he understood the last day for answering was August 10th. Burnett corroborates the above regarding his having been retained, and states that he was advised by defendant's Wisconsin counsel "that the time for answering would expire on August 10, 1912, and that affiant relied on said information, and further states that he received no information whatever from T. F. Murtha, or anyone else, as to when the time for answering expired, other than the information received in said letter." It is true that plaintiff and his stenographer, one Sturgeon, made affidavits, which were used on the motion, disputing Burnett's affidavit

upon the point last mentioned, and plaintiff and his stenographer each swear that Burnett was informed within a week after July 15th, of the date of the service of the summons and complaint upon the secretary of state. While the preponderance of proof would thus appear to be in plaintiff's favor on this point, we cannot say that the trial court clearly abused its discretion in determining, in defendant's favor, the disputed question of fact thus presented.

But appellant contends that § 6884, Rev. Codes 1905, authorizing the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, or excusable neglect, does not permit such relief to be granted where the mistake, inadvertence, surprise, or excusable neglect was that of counsel instead of the party asking such relief. This statute was before us for construction in *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A. (N.S.) 858, 126 N. W. 102, and we there approved the rule of the Minnesota supreme court "that where the answer discloses a good defense upon the merits, and a reasonable excuse for delay occasioning default is shown, and no substantial prejudice appears to have arisen from the delay, the court should open the default and bring the case to trial." *Barrie v. Northern Assur. Co.* 99 Minn. 272, 109 N. W. 248. We there also announced the law generally applicable to such motions for relief; and in the second paragraph of the syllabus the following language is used: "In a case in which a party to an action employs counsel of good reputation and large experience, the neglect by such counsel of matters necessary to the ordinary procedure of the case is a 'surprise' to the party, within the meaning of the statute, entitling him to relief in such case." We think the facts in the case at bar bring the case fairly within the rule in the *Branden Case*. Appellant criticizes the *Branden* opinion, intimating, at least, that the court went to the extreme limit in announcing the rule of that case. Conceding, for the purposes of the case at bar, that such criticism is well-founded, it should be observed that the facts disclosed by the record now before us materially differ from those in the *Branden Case* in at least one important particular. In the case at bar we are asked to reverse an order relieving a party from default and permitting a trial on the merits, while in the *Branden Case* the trial court refused such relief, and we were asked to and did reverse such order as a clear abuse of discretion.

Had the trial court refused relief to defendant in the case at bar, and such defendant were here asking a reversal, plaintiff would stand in a more advantageous position than he does on this appeal.

Order affirmed.

PATTERSON LAND COMPANY v. GEORGE W. LYNN.

(147 N. W. 256.)

Plaintiff must recover on strength of own title — deed from county — good against world — excepting former fee owner — validity — sufficient to support this action.

1. Plaintiff must recover upon the strength of its own title, but in the case at bar such title is shown by a deed from Emmons county, fair upon its face, and good against all the world excepting the former fee owners. The defendant not being in a position to attack the validity of the plaintiff's title, it is sufficient to support this action.

Evidence — deeds from county — no fraud shown.

2. Evidence examined, and *held* that there was no fraud in the transactions by which plaintiff obtained the deeds from Emmons county.

Decree — attack — quieting title.

3. Defendant was never in a position to attack decree obtained by the plaintiff's grantor, quieting title in the lands.

State's attorney — duty to county — antagonistic claims — buying — acts after term — estoppel — trust — violation — fraud — need not be shown — presumption.

4. Defendant, as state's attorney of Emmons county, owed a duty to the county to perfect its title to the lands in suit, and he is estopped, even after his term of office is expired, to buy antagonistic titles and assert ownership in the lands against the county or its grantee. Actual fraud need not be shown, nor any intentional violation of trust. It may be conceded that defendant acted in an honest, though mistaken, belief that he had a right to buy the outstanding titles. The law says that he must not buy, and if he does so it will be conclusively presumed that he purchased for the county.

Evidence — attorney and client — relation of.

5. Evidence examined, and *held* that while the relation of attorney and client may not have existed between defendant and plaintiff's grantor, still the circumstance related in the opinion tends to strengthen the conclusion reached in the foregoing paragraph.

Stipulations — fraud upon court — void.

6. Certain stipulations between the plaintiff and defendant in a former action, examined, and *held* to be a fraud upon the court, and are therefore set aside.

Fee owner — title — taxes — lien — estoppel.

7. Defendant's correspondence with the former fee owners examined, and *held* that defendant was endeavoring to obtain what he considered perfect title to the land, subject only to the lien of the taxes, under the Wood law, but that he was estopped from acquiring such a title.

Involuntary trustee — for benefit of county.

8. The defendant is an involuntary trustee for the benefit of Emmons county and its grantors.

Mortgages — by former fee owner — foreclosure — title.

9. Two of the quarter-sections involved in the litigation were acquired by defendant through the foreclosure of mortgages given by the former fee owners. *Held*, that it does not change the situation in any particular.

Complaint — amendments offered — rejection — error.

10. Certain amendments to the complaint considered, and *held* they were improperly rejected by the trial court. Judgment entered ordering the defendant to convey the lands to plaintiff upon the payment of his costs incident to obtaining title and for improvements and taxes, if any, paid by him.

Opinion filed March 6, 1914. Rehearing denied April 11, 1914.

Appeal from district Court of Emmons County, *Winchester, J.*

Reversed.

Watson & Young, for appellant, and *Durment, Moore, & Oppenheimer*, and *Ashley Coffman*, of counsel.

A state's attorney of a county, having been its legal adviser, and especially in the matter of the county acquiring title to lands, and later in quieting the title, is estopped to acquire or assert an interest in such lands adverse to the county or to its grantees, and any interest he may have acquired is for their benefit. 4 Cyc. 958; 3 Am. & Eng. Enc. Law, 344, 2d ed.; Weeks, Attorneys at Law, 2d ed. § 121; *Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422.

In some cases this rule has been relaxed, so that where an attorney so acts, the transaction is presumed to be fraudulent, and the burden rests upon the attorney to establish the fairness, adequacy, and equity of the transaction. *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14

Pac. 523; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Cowee v. Cornell*, 75 N. Y. 100, 31 Am. Rep. 428; *Nesbit v. Lockman*, 34 N. Y. 167; *Re Freerks*, 11 N. D. 120, 90 N. W. 265; *Weeks, Attorneys at Law*, § 271; *Rev. Codes 1899*, § 427; *Henry v. Raiman*, 25 Pa. 354, 64 Am. Dec. 703; *Reid v. Stanley*, 6 Watts & S. 376; *Baker v. Humphrey*, 101 U. S. 494, 25 L. ed. 1065; *May v. Le Claire*, 11 Wall. 217, 20 L. ed. 50; *Galbraith v. Elder*, 8 Watts, 81; *Smith v. Brotherline*, 62 Pa. 461; *Hoopes v. Burnett*, 26 Miss. 428; *Jett v. Hempstead*, 25 Ark. 462; *Fox v. Cooper*, 2 Q. B. 937, 6 Jur. 128; *Taylor v. Blacklow*, 3 Bing. N. C. 235, 3 Scott, 614, 2 Hodges, 224, 6 L. J. C. P. N. S. 14.

An attorney in the employ of another cannot buy and hold property in which his client is interested, otherwise than in trust, where his employment relates to such property. *Smith v. Brotherline*, 62 Pa. 461; *Davis v. Smith*, 43 Vt. 269; *Wheeler v. Willard*, 44 Vt. 641; *Giddings v. Eastman*, 5 Paige, 561; *Moore v. Bracken*, 27 Ill. 23; *Harper v. Perry*, 28 Iowa, 57; *Hockenbury v. Carlisle*, 5 Watts & S. 348; *Hobday v. Peters*, 6 Jur. N. S. 754, 28 Beav. 349, 29 L. J. Ch. N. S. 780, 2 L. T. N. S. 590, 8 Week. Rep. 512; *Jett v. Hempstead*, 25 Ark. 462; *Case v. Carroll*, 35 N. Y. 385; *Lewis v. Hillman*, 3 H. L. Cas. 607.

Actual fraud is not necessary in such case to give the client redress. A *breach of duty* is constructive fraud, and is sufficient. *Story*, Eq. Jur. §§ 258, 311; *Sanford v. Flint*, 108 Minn. 399, 122 N. W. 315; *Doster v. Scully*, 27 Fed. 782.

An attorney employed to prepare a deed for land, or consulted in relation to the same and to the title, is precluded from buying in, for his own use, any outstanding title. *Smith v. Brotherline*, 62 Pa. 461; *Galbraith v. Elder*, 8 Watts, 94; *Cleavinger v. Reimen*, 3 Watts & S. 486; *Henry v. Raiman*, 25 Pa. 354, 64 Am. Dec. 703; *Downard v. Hadley*, 116 Ind. 131, 18 N. E. 457; 1 *Perry, Tr. & Trustees*, § 166; *Gibbons v. Hoag*, 95 Ill. 45; *Ainsworth v. Harding*, 22 Idaho, 645, 128 Pac. 92; *Davis v. Kline*, 96 Mo. 401, 2 L.R.A. 78, 9 S. W. 724; *Ringo v. Binns*, 10 Pet. 269, 280, 9 L. ed. 420, 425; *United States v. Costen*, 38 Fed. 24; *Re Boone*, 83 Fed. 944; *Phillips v. Blair*, 38 Iowa, 653; *Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; *Carter v. Palmer*, 8 Clark & F. 657, 11 Bligh. N. R. 397; *Kennedy v. Redwine*, 59

Ga. 327; Hatton v. Robinson, 14 Pick. 416, 25 Am. Dec. 415; Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408; Briggs v. Hodgdon, 78 Me. 514, 7 Atl. 387; Turley v. Turley, 85 Tenn. 251, 1 S. W. 891; Emil Kiewert Co. v. Juneau, 24 C. C. A. 294, 47 U. S. App. 394, 78 Fed. 708; Garinger v. Palmer, 61 C. C. A. 436, 126 Fed. 906; 11 Cyc. 647.

Actual fraud on the part of the attorney need not be shown. From the relation of attorney and client, it is presumed. Weeks, Attorneys at Law, 2d ed. § 258; Yerkes v. Crum, 2 N. D. 72, 49 N. W. 422; Perry, Tr. & Trustees, 6th ed. § 202; Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655; St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256; Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703; Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Downard v. Hadley, 116 Ind. 131, 18 N. E. 457.

When attacked, the burden rests with the attorney to show good faith. Weeks, Attorneys at Law, 2d ed. § 258; Cunningham v. Jones, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572; Shropshire v. Ryan, 111 Iowa, 677, 82 N. W. 1035; Home Invest. Co. v. Strange, — Tex. Civ. App. —, 152 S. W. 510; Standwood v. Wishard, 128 Fed. 499; Trice v. Comstock, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620.

The state's attorney, having represented to a purchaser of lands from his county that the title was good, cannot, in a suit involving such lands, falsify such representations; and he is estopped to acquire any title adverse to the title granted by his county to such purchaser. Rev. Codes, 1905, § 7316; Herman, Estoppel, §§ 730, 911; 16 Cyc. 680, 683; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Sedgw. & W. Trial of Title to Land; Doster v. Scully, 27 Fed. 782; Gibbons v. Hoag, 95 Ill. 45; Bacon v. Bronson, 7 Johns. Ch. 194, 11 Am. Dec. 449; 11 Cyc. 699; Bigelow, Estoppel, 5th ed. 570.

Defendant was forbidden by statute and by common law to obtain quitclaim deeds to the property in question, or to attempt to enforce the same. N. D. Rev. Codes 1905; Penal Codes 1877, §§ 195, 200, Rev. Codes 1899, §§ 7008, 7013; 4 Kent, Com. 12th ed. 446; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Steere v. Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256; Browning v. Marvin, 100 N. Y. 148, 2 N. E. 635; Wetmore v. Hegeman, 88 N. Y. 73; Baldwin v.

Latson, 2 Barb. Ch. 306; Winterberg v. Van de Vorste, 19 N. D. 417, 122 N. W. 866; Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318.

The deeds to the attorney, having been obtained from persons who had abandoned the land, and had failed for years to pay the taxes, conveyed no title or interest. Cotton v. Horton, 22 N. D. 1, 132 N. W. 225; Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318; Bausman v. Faue, 45 Minn. 418, 48 N. W. 13; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Shelby v. Bowden, 16 S. D. 531, 94 N. W. 416; Farr v. Semmler, 24 S. D. 290, 123 N. W. 835; Ford v. Ford, 24 S. D. 644, 124 N. W. 1108; 16 Cyc. 718, 11 Am. & Eng. Enc. Law, 394; Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495; Pom. Eq. Jur. 802.

The deeds so obtained were champertous and void. Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77; Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79.

Under such circumstances a court of equity will not aid the attorney in carrying out his scheme. Cotton v. Horton, 22 N. D. 1, 132 N. W. 225; Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Holgate v. Eaton, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. Rep. 224; O'Fallon v. Kennerly, 45 Mo. 124; Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856.

The attorney, having obtained the deeds by representing to the grantors that they were for the benefit of the record owners, became an involuntary trustee for this plaintiff, the record owner, of such title as he received. Rev. Codes 1905, § 5711; Perry, Tr. & Trustees, 181; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Gates v. Kelley, 15 N. D. 639, 110 N. W. 770; Yerkes v. Crum, 2 N. D. 77, 49 N. W. 422; Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703; Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065; Downard v. Hadley, 116 Ind. 131, 18 N. E. 457; Sutherland v. Reeve, 41 Ill. App. 295; Ainsworth v. Harding, 22 Idaho, 645, 128 Pac. 92; Winterberg v. Van de Vorste, 19 N. D. 417, 122 N. W. 866; Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338; Johnson v. Knappe, 24 S. D. 407, 123 N. W. 857; Rollins v. Mitchell, 52 Minn. 41, 38 Am. St. Rep. 519, 53 N. W. 1020.

Appellants have title to these lands through decrees regularly entered against the former owners, and the deeds to the attorney conveyed no

title. Rev. Codes 1899, § 5249; *Star v. Mahan*, 4 Dak. 213, 30 N. W. 169; *Foster v. Wood*, 30 How. Pr. 284; *W. W. Kimball Co. v. Brown*, 73 Minn. 167, 75 N. W. 1043; 1 Black, Judgm. 2d ed. p. 334; *Scarborough v. Myrick*, 47 Neb. 794, 66 N. W. 867; *Wilkins v. Wilkins*, 26 Neb. 235, 41 N. W. 1101; *Hume v. Conduitt*, 76 Ind. 598; *Isaacs v. Price*, 2 Dill. 347, Fed. Cas. No. 7,097; *Salter v. Hilgen*, 40 Wis. 363; *Van Wyck v. Hardy*, 20 How. Pr. 222; *Briggs v. Hodgdon*, 78 Me. 514, 7 Atl. 387; *Pike v. Galvin*, 29 Me. 183; *Crocker v. Pierce*, 31 Me. 177; *Crayton v. Spullock*, 87 Ga. 326, 13 S. E. 561; *Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415; *Weeks, Attorneys at Law*, §§ 271 et seq.; *Zeigler v. Hughes*, 55 Ill. 288.

The judgments entered in favor of this attorney, conveying the lands here involved, are void and unenforceable because of the deceit and fraud practised by the attorney, and are no bar to this action. Rev. Codes 1905, ¶ 2, §§ 500, 5293, 5294; 1 Herman, Estoppel, §§ 226, 250, 391; 3 Dan. Ch. Pl. & Pr. Perkins's ed. 1843; 2 Pom. Eq. Jur. § 919; 1 High, Inj. 2d ed. §§ 112, 281; 1 Foster, Fed. Pr. 2d ed. §§ 358, 678; *Wright v. Miller*, 1 Sandf. Ch. 103; *Barnesly v. Powel*, 1 Ves. Sr. 120, 289; *Livingston v. Hubbs*, 2 Johns. Ch. 124; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135; *Glover v. Hedges*, 1 N. J. Eq. 113; *Standen v. Edwards*, 1 Ves. Jr. 133, 1 Madd. Ch. 236; *Vanmeter v. Jones*, 3 N. J. Eq. 523; *Gifford v. Thorn*, 9 N. J. Eq. 703; *Whittemore v. Coster*, 4 N. J. Eq. 438, 41 Am. Dec. 740; *Boulton v. Scott*, 3 N. J. Eq. 231; 2 Bl. Com. 346; 2 Hargrave's Juridical Arguments, 392; *McKenzie v. Stewart*, Dom. Proc. 1754; Cruise Dig. title 33; Private Act, 50, 51; *Mussel v. Morgan*, 3 Bro. Ch. 74; *Richmond v. Tayleur*, 1 P. Wms. 734; *Lloyd v. Mansell*, 2 P. Wms. 74; *Whitechurch v. Whitechurch*, 2 P. Wms. 236; *Vanmeter v. Jones*, 3 N. J. Eq. 520; *Doughty v. Doughty*, 27 N. J. Eq. 315; *Cairo & F. R. Co. v. Titus*, 28 N. J. Eq. 269; *Jewett v. Dringer*, 31 N. J. Eq. 586; *Byers v. Surget*, 19 How. 303, 15 L. ed. 670; *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619; *Story*, Eq. Jur. §§ 887, 1570, 1573, 1574; *Kerr, Fr. & Mistake*, 352, 353; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; *Reigal v. Wood*, 1 Johns. Ch. 402; *United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. ed. 93, 95; *Marshall v. Holmes*, 141 U. S. 589,

596, 35 L. ed. 870, 872, 12 Sup. Ct. Rep. 62; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. ed. 362, 363; *Hendrickson v. Hinckley*, 17 How. 443, 15 L. ed. 123; *Crim v. Handley*, 94 U. S. 652, 653, 24 L. ed. 216; *Metcalf v. Williams*, 104 U. S. 93, 96, 26 L. ed. 665, 666; *Embry v. Palmer*, 107 U. S. 3, 11, 27 L. ed. 346, 349, 2 Sup. Ct. Rep. 25; *Knox County v. Harshman*, 133 U. S. 152, 154, 33 L. ed. 586, 587, 10 Sup. Ct. Rep. 257; *Floyd v. Jayne*, 6 Johns. Ch. 482; *Beard v. Campbell*, 2 A. K. Marsh. 125, 12 Am. Dec. 364; *Waters v. Mattingly*, 1 Bibb, 244, 4 Am. Dec. 632; *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872; *Wayland v. Tysen*, 45 N. Y. 281; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Aldrich v. Barton*, 138 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703; *Michigan v. Phoenix Bank*, 33 N. Y. 9; *Lloyd v. Mansell*, 2 P. Wms. 74; *Kennedy v. Daily*, 6 Watts, 269; *Van Cortland v. Underhill*, 17 Johns. 405; *Davis v. Tileston*, 6 How. 114, 12 L. ed. 366; *Bulkley v. Starr*, 2 Day, 552; *Fenemore v. United States*, 3 Dall. 357, 1 L. ed. 634; *Willson v. Force*, 6 Johns. 110, 5 Am. Dec. 195; *Jackson ex dem. Tracy v. Hayner*, 12 Johns. 469; *Barber v. Kerr*, 3 Barb. 150; *Clark v. Underwood*, 17 Barb. 202; *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438; *Weed v. Bentley*, 6 Hill, 56; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Reed v. Harvey*, 23 Ark. 44; *Hayden v. Hayden*, 46 Cal. 333; *Shinkle v. Letcher*, 47 Ill. 217; *Taylor v. Nashville & C. R. Co.* 86 Tenn. 228, 6 S. W. 393; 3 Pom. Eq. Jur. 400; *Kearney v. Smith*, 3 Yerg. 127, 24 Am. Dec. 550; *Stone v. Moody*, 6 Yerg. 31; *Rice v. Railroad Bank*, 7 Humph. 42; *Schwab v. Mount*, 4 Coldw. 62; *Rowland v. Jones*, 2 Heisk. 323; *Hickerson v. Raiguel*, 2 Heisk. 333; *Turley v. Taylor*, 6 Baxt. 377; *Smith, Fr.* § 224; *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376; *Capital Bank v. Rutherford*, 70 Ga. 57; *Dunn v. Miller*, 96 Mo. 324, 9 S. W. 640; *Northern P. R. Co. v. Barlow*, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912C, 763; *Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897; *McClure v. Sheek*, 68 Tex. 426, 4 S. W. 552; *Wells v. Jackson Iron Mfg. Co.* 48 N. H. 526; *Heywood v. Wingate*, 14 N. H. 73; *Goodrich v. Eastern R. Co.* 38 N. H. 395; *Richardson v. Huggins*, 23 N. H. 119; *Gregory v. Pierce*, 4 Met. 478; *Bellows v. Stone*, 14 N. H. 175; *Becker v. Lamont*, 13 How. Pr. 23; *Furnival v. Bogle*, 4 Russ.

Ch. 149, 6 L. J. Ch. 91, 28 Revised Rep. 34; Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Magnolia Metal Co. v. Pound, 60 App. Div. 318, 70 N. Y. Supp. 230; Noriega v. Knight, 20 Cal. 173; Brown v. Post, 1 Hun, 303; Hannah v. Chase, 4 N. D. 351, 50 Am. St. Rep. 656, 61 N. W. 18; Brown v. Comonow, 17 N. D. 84, 114 N. W. 728; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722; Young v. Engdahl, 18 N. D. 166, 119 N. W. 169; Re Olmstead, 11 N. D. 306, 91 N. W. 943; Lowenthal's Case, 61 Cal. 122; Gilbreath v. Teufel, 15 N. D. 152, 107 N. W. 49; Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027; Skjelbred v. Shafer, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; De Louis v. Meek, 2 G. Greene, 55, 50 Am. Dec. 491; Lazarus v. McGuirk, 42 La. Ann. 194, 8 So. 253; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362; Wells, Res Adjudicata, § 499; Pearce v. Olney, 20 Conn. 544; Wierich v. De Zoya, 7 Ill. 385; Kent v. Ricards, 3 Md. Ch. 392; Smith v. Lowry, 1 Johns. Ch. 320; De Louis v. Meek, 2 G. Greene, 55, 50 Am. Dec. 491; Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 512, 28 L. ed. 501, 4 Sup. Ct. Rep. 583; 3 Pom. Eq. Jur. 3d ed. 1052, pp. 2031, 2032; 23 Cyc. 1024, 1025; Balch v. Beach, 119 Wis. 77, 95 N. W. 132; Stowell v. Eldred, 26 Wis. 504; Barber v. Rukeyser, 39 Wis. 590; Hiles v. Mosher, 44 Wis. 601; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Crowns v. Forest Land Co. 102 Wis. 97, 78 N. W. 433; Boring v. Ott, 138 Wis. 260, 19 L.R.A.(N.S.) 1080, 119 N. W. 865; Guild v. Phillips, 44 Fed. 461; Currier v. Esty, 110 Mass. 536.

The *cestui que trust* must, if he asks the interposition of a chancellor to assist him, do equity by reimbursing the trustee in his outlay, unless it be in a case of manifest fraud intended and attempted to be perpetrated. Home Invest. Co. v. Strange, — Tex. Civ. App. —, 152 S. W. 510.

Reimbursement must be made on the principle that he who asks equity must do equity. McKenzie v. Boynton, 19 N. D. 531, 125 N. W. 1059.

The appellant's proposed amendments to the complaint should have

been allowed. *Faxon v. Ball*, 67 Hun, 649, 21 N. Y. Supp. 737; *Sawyer v. Bennett*, 63 Hun, 631, 18 N. Y. Supp. 24; *Powers v. Hughes*, 7 Jones & S. 482; *Hayes v. Davidson*, 33 Hun, 446; *Hayes v. St. Mary's Lodging House*, 89 Hun, 27, 34 N. Y. Supp. 996; 3 Enc. Pl. & Pr. 529; *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570; *Washburn v. Winslow*, 16 Minn. 33, Gil. 19; *Catlin v. Gunter*, 11 N. Y. 368, 62 Am. Dec. 113; *North Star Boot & Shoe Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593; 1 Enc. Pl. & Pr. 515, 516, 556; *Maddox v. Thorn*, 8 C. C. A. 574, 23 U. S. App. 189, 60 Fed. 217; *State ex rel. Morgan v. Smith*, 95 N. C. 396; *Lake Erie & W. R. Co. v. Boswell*, 137 Ind. 336, 36 N. E. 1103; *Meyer v. State*, 125 Ind. 335, 25 N. E. 351; *Kelsey v. Chicago & N. W. R. Co.* 1 S. D. 80, 45 N. W. 204; *J. I. Case Threshing Mach. Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82; *Willis v. De Witt*, 3 S. D. 281, 52 N. W. 1090.

There is a wide difference between facts not occurring until after the action is commenced, and matters existing but not discovered until after commencement of action. Comp. Laws, § 4938, amended by chap. 54, Laws 1897; *Lustig v. New York, L. E. & W. R. Co.* 48 N. Y. S. R. 916, 20 N. Y. Supp. 477; *Coby v. Ibert*, 6 Misc. 16, 25 N. Y. Supp. 998; 31 Cyc. 392; *Harkins v. Edwards*, 1 Iowa, 296; *Bebb v. Preston*, 3 Iowa, 325; *Kiene v. Ruff*, 1 Iowa, 482; *Bunn v. Pritchard*, 6 Iowa, 56; *Arbuckle v. Bowman*, 6 Iowa, 70; *Logan v. Tibbott*, 4 G. Greene, 389; *Wilson v. Johnson*, 1 G. Greene, 147; *Stevens v. Campbell*, 6 Iowa, 538; *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278; *Home Ins. Co. v. Overturf*, 35 Ind. App. 361, 74 N. E. 47; *Pangborn v. Continental Ins. Co.* 67 Mich. 683, 35 N. W. 814; *Case v. Carroll*, 35 N. Y. 385.

The effect of the deed from the county to the Hackney-Boynton Land Company is not here involved, according to the controlling facts established. Rev. Codes, § 2494, subs. 6, 10, 12, § 2578; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23.

If proper deeds cannot be secured and delivered to the proper parties, then a personal decree should be entered against the attorney for the value of the property. *Home Invest. Co. v. Strange*, — Tex. Civ. App. —, 152 S. W. 510; *Prondzinski v. Garbutt*, 10 N. D. 309, 86 N. W. 969; *Hill, Trustees*, 522; *Perry, Tr. & Trustees*, § 847; *Hardin*

v. Eames, 5 Ill. App. 153; *Loomis v. Satterthwaite*, — Tex. Civ. App. —, 25 S. W. 68; *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799; *Silliman v. Gano*, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391; *Rogers v. Barnes*, 169 Mass. 179, 38 L.R.A. 145, 47 N. E. 602; *Mixon v. Miles*, — Tex. Civ. App. —, 46 S. W. 105; *Ringgold v. Ringgold*, 1 Harr. & G. 11, 18 Am. Dec. 250; *Chamberlain v. O'Brien*, 46 Minn. 80, 48 N. W. 447; *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937; *Haxton v. McClaren*, 132 Ind. 235, 31 N. E. 48.

Geo. W. Newton, R. N. Stevens, and H. C. Lynn, for respondent.

Whenever a demand is presented under the circumstances disclosed in this case, the right of recovery is tested from an inquiry as to whether the demand is connected with an illegal transaction in such way as that the plaintiff requires any aid from such transaction to establish his case. *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Pike v. King*, 16 Iowa, 49; *Scott v. Duffy*, 14 Pa. 18; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Swan v. Scott*, 11 Serg. & R. 164.

The rule is settled that where the only road to a recovery is by way of an illegal contract, the court will render no assistance. *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L.R.A. 224, 20 N. E. 222; *Martin v. Hodge*, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694; *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415; *Gregg v. Wyman*, 4 Cush. 322; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699; *Fitzgerald v. Grand Trunk R. Co.* 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; *De Witt v. Lander*, 72 Wis. 120, 39 N. W. 349; *Eberman v. Reitzel*, 1 Watts & S. 181; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Keith v. Fountain*, 3 Tex. Civ. App. 391, 22 S. W. 191.

Mr. Lynn is in no way estopped. He was not at any time employed by Emmons County, or by any officer of such county at the time the record titles to said lands were being perfected. He took no part in the Hackney-Boynton sales or purchases. *Painter v. J. B. Painter Co.* 133 Cal. 130, 65 Pac. 311; *Eldred v. White*, 102 Cal. 604, 36 Pac. 944; *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085; *Steen v. March*, 132 Cal. 616, 64 Pac. 994; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736; *Champion v. Woods*, 79 Cal. 17, 12 Am. St. Rep. 126, 21 Pac. 534.

Equity will not grant relief from the judgment obtained by fraud, unless the parties seeking such relief have been free from negligence.

People ex rel. Schwartz v. Temple, 103 Cal. 447, 37 Pac. 414, 416; Young v. Fink, 119 Cal. 107, 50 Pac. 1060; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454.

BURKE, J. This action with the six other cases closely allied, involves the title to some 3,200 acres of land situated in Emmons county, North Dakota. The facts in the case are largely in dispute, and the abstract covers something like 1,500 pages of printed matter; appellant's brief contains nearly 400 pages, while respondent's brief is but a few pages shorter. The case comes to us for trial *de novo*, which means that this court must pass upon all the disputed questions of fact, and then declare the law governing. In order to keep the opinion within reasonable bounds, many of the findings of this court will be merely announced, without quoting at length from the evidence; while such of the minor disputes of facts as we consider immaterial will not be noticed. The more important facts will be treated at length, and extracts from the evidence set forth in the opinion. All of the questions, however, have received careful attention by the court sitting as a whole, and each dispute has been settled by a majority vote of the members of this court.

The undisputed facts are that prior to the year 1897 some of the lands of Emmons county had been abandoned by the owners, who refused to pay taxes upon the same. The twenty quarter-sections involved in this litigation were in this class. Those twenty tracts were owned by nonresidents scattered over the United States, and all of the land was unoccupied and uncultivated. Up to that time, tax titles were considered of little value, and were frequently set aside by the courts.

Chapter 67 of the Laws of 1897, known as the Wood law, permitted the counties to proceed against real property for back taxes in a regular court proceeding, and provided for the issuance of execution and a sale of the land the same as though the judgment had been based upon a money demand. The county commissioners of Emmons county proceeded promptly under this law, and on the 4th day of October, 1897, the lands were sold and bid in by the county. The validity of those proceedings was attacked, and eventually the question reached this court, where, on the 27th day of October, 1900, in the case of Emmons County v. First Nat. Bank, 9 N. D. 583, 84 N. W. 379, and twenty-six other

cases, the proceedings were in all things upheld. Thereafter everybody in Emmons county believed the county to be the owner absolutely of those lands. Although some twenty-seven actions had been taken to the supreme court, none of the lands mentioned in the case at bar were involved.

In 1901 the Hackney-Boynton Land Company purchased from the Northern Pacific Railway Company all of its North Dakota lands east of the Missouri river, at the price of \$1.05 per acre. Some 200,000 acres of this land was situated in Emmons county alone, some adjoining the twenty tracts involved in the present litigation. The company was extensively engaged in selling those lands to settlers, and had established a local agency in Emmons county.

In the same year the county of Emmons had begun the erection of a new courthouse, and was in pressing need of money to make payments upon the building, so made efforts to sell the lands acquired by them under the Wood law to provide a revenue for this purpose.

George W. Lynn, the defendant, had settled in Emmons county in 1886, was admitted to the bar of North Dakota in 1890, and thereafter engaged in the active practice of his profession in said county. From 1892 to 1897; from January 1st, 1901, to January 1st, 1905; from January, 1907, to January 1909; and from January 1st, 1913, to the present time,—he was and is the duly elected, qualified, and acting state's attorney of Emmons county. He had shared the general opinion of the county officials of that county that Emmons county owned this land, and had so advised prospective purchasers. He had prepared a form of deed which was used in conveying one quarter-section of said land to a man named Naaden. He had also advised the county commissioners that they had a perfect right to sell this land by warranty deed, and had himself bought from the county the buildings upon one of the tracts.

The county commissioners, among other things, advertised the lands for sale in various newspapers, sent circular letters offering the lands for sale to the various land companies who might be interested in their purchase. One of those circular letters was sent to the Hackney-Boynton Land Company. Finally the lands were unofficially advertised to be sold to the highest bidder for cash; sealed bids to be received up to and including November 4, 1901. Hackney-Boynton Land Com-

pany made a bid for all of the lands owned by the county, at the price of \$1.32 per acre. There is considerable dispute as to the reception accorded this bid, but in many respects it is immaterial. Eventually the county sold and the land company bought the tracts involved in this litigation at an agreed price, and the county executed its deed covering said tracts. There is also much dispute as to the connection of Mr. Lynn with this sale, and this will be treated later in the opinion. It is not disputed that he was at the time state's attorney, and the deed used was prepared from a form drawn up by him. Upon receiving the deeds for the 6,761 acres of land aforesaid, the land company, in March, 1902, instituted actions against the original fee owners to quiet title, and before serving the same they wrote to Mr. Lynn, asking him to do a little work for them, and inclosing a list of questions for him to answer concerning the proceedings taken by the county in perfecting title in itself. It is contended by plaintiff that Mr. Lynn was thus employed as an attorney in such litigation, but this is stoutly denied by defendant, and will be treated at length later in the opinion. In any event, defendant Lynn answered the questions, forwarded the same to the land company with a bill for \$10 for his services, which bill has never been paid. The actions proceeded to judgment, and a decree was entered quieting title in the land company to all of the lands covered by this litigation, and the land company paid the taxes from that time to date, listed the same, sold the hay thereon, and showed the same to prospective purchasers the same as its other lands.

The Wood law resulted in much litigation, and reached this court in various forms in: *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241; *Purcell v. Farm Land Co.* 13 N. D. 327, 100 N. W. 700; *Cruser v. Williams*, 13 N. D. 284, 100 N. W. 721; *Darling v. Purcell*, 13 N. D. 288, 100 N. W. 726. In the case of *Cruser v. Williams*, *supra*, which involved lands in Emmons county sold under the Wood law, but not involved in the present litigation, it was held that the county had not given the proper notice of redemption to the fee owners, and that all sales made by said county were subject to the right of the owner to redeem therefrom, and the purchasers had only a lien upon the property. This decision was filed July 12, 1904, and was a surprise to everybody interested in the question, and especially to the purchasers of the lands who had so long relied upon the case of *Emmons County v. First*

Nat. Bank, 9 N. D. 583, 84 N. W. 379. Mr. Lynn was one of the attorneys of record in the Cruser Case, and had argued against the decision rendered therein. His term as state's attorney expired January 1, 1905, and shortly thereafter he conceived the idea of obtaining quitclaim deeds from the original owners, and instituting actions to redeem from the Wood law sales. There is in evidence a letter written by Mr. Lynn to a Mr. Dunton, dated April 7, 1905, in which he says, among other things: "The land of this county is worth from \$5 to \$10 an acre, and on these titles the taxes will average about \$3 per acre, that is including the interest and everything that will have to be paid in case of redemption. . . . In case I am right, all the tax titles in this county will have to go and a redemption be allowed. Now, of the original eighty tracts that went to tax title there is about fifteen of them been fixed up. . . . In making my list of same I have fifty one-quarter sections. Of these I have secured only eleven, and have all fee owners located except three, and have had correspondence with all except five, which refused to answer my letters. The eleven that I have secured cost me on an average of \$54.09 per quarter-section. Of course, I have got some pretty cheap, by reason of the fact I was acquainted with the parties. Of these fee owners on all the tracts, about half live east of Chicago and the others west. Of those living east the fee title could be handled best from the east, and those west could be handled best from here. In getting this title that I have got, have done the same all by mail, and expect to get yet about as many more titles, as I have been working on the same only from January 1st. Now, the amount of money to be paid in this matter depends upon the amount of energy and ingenuity that is used in the purchase of the same. In order to keep down the cost, again it depends on the manner that the tax titles are gone after, as to how cheap a settlement can be made, and if one tax title is knocked out in each county it will lessen the cost of all others very materially. I take it from what you say that you want me to look up the tax title and approve the same as to the proceedings had under the tax law. . . . I do not have any definite way in which we could engage in the same together; that is, I do not have in mind any way in which we would divide the spoils that would be fair to both. If you have such an arrangement in your mind, would be pleased to have

you make me a proposition, as if I do this, would want to know that I could so arrange matters here that I could get away.

(Signed) George W. Lynn."

As stated in the above letter, Mr. Lynn had already obtained quitclaim deeds from several of the former fee holders. The method pursued by Mr. Lynn in obtaining those deeds is important, and forms one of the principal disputes in this action. The land company insists that Mr. Lynn's conduct in those transactions, taken together with the fact that he was state's attorney for Emmons county in 1901, and their own attorney in 1902, makes him an involuntary trustee of the title for their benefit. This subject will be discussed later.

After quitclaim deeds were obtained for the various tracts, on February 24, 1908, Lynn began four suits to quiet title to ten of the tracts above enumerated. The necessity for four suits arose from the fact that the Hackney-Boynton Land Company had divided its holdings into four parts, Mr. Hackney, Mr. Boynton, Mr. Hoerr, and Mr. Patterson each receiving his share of the lands owned by the original company. The summons and complaint in each case were duly served, and were referred to Messrs, Cochrane & Philbrick, attorneys, at Bismarck, North Dakota, for attention. About the same time, or shortly prior thereto, Lynn applied to the district court, and secured orders setting aside the decree already entered quieting title in the Hackney-Boynton Land Company. When the cases of Lynn against the four defendants were reached for trial, a stipulation was made between the attorneys to the effect that Lynn was the owner of the ten tracts of land, unless he had been divested of his title by the proceedings taken by Emmons county under the Wood law. No other defense was interposed by the defendants, and the trial court made findings of fact to the effect that Lynn was such owner of the tracts, subject only to the lien of the taxes acquired by the land company from Emmons county. No appeal was taken from this judgment, and the time for appeal has now long since expired. The validity of this second decree, which quieted the title of the lands in Lynn, has an important bearing upon the results to be reached in this suit, and will be treated at length later in the opinion.

In 1910 the present actions were instituted in equity, setting forth in full all the transactions mentioned heretofore, and asking that the

judgments quieting title in Lynn be vacated and set aside; that Lynn be enjoined from entering further judgments upon the stipulation made with Cochrane & Philbrick; that the order quieting title in the land company be reinstated; and for such other and further equitable relief as may to the court seem just. Later and during the course of the trial an attempt was made to amend this complaint to show that Mr. Lynn had at one time acted as attorney for the land company, and had thus secured the information which enabled him to obtain the quitclaim deeds to himself, and that the defendant Lynn had obtained the quitclaim deeds aforesaid by representing to the person who executed the same that the quitclaim deed would be used merely to remove a cloud from the record title. To each of those complaints an answer was interposed by Mr. Lynn, setting up the stipulations with Cochrane & Philbrick, the invalidity of the proceedings under the Wood law, a denial that he was attorney for the land company, and setting up the former adjudication in his favor as a bar to the present action, and that the plaintiff's title was defective through fraud in obtaining the warranty deed from Emmons county. The trial resulted in a judgment for the defendant in each of the actions, and this appeal followed.

(1) The first question relates to the right of plaintiff to maintain this action. The Patterson Land Company is one of the grantees of Hackney-Boynton Land Company, who received its deed from Emmons county as aforesaid.

The plaintiff must recover upon the strength of its own title, and respondent vigorously insists that such title has not been shown. While it is true that this court in *Cruser v. Williams*, 13 N. D. 284, 100 N. W. 721, held that no notice of redemption had been given by Emmons county to the various fee owners, yet we think this defense available only to such fee owners. In view of the holding in the fourth paragraph of this opinion, it is apparent that defendant is estopped to assert title to these tracts, and it necessarily follows that he is estopped to attack plaintiff's title, which is fair upon its face and good against all the world, including Mr. Lynn, but excepting only the former fee owners. If Mr. Lynn could rightfully trace his title from those fee owners, he would be in a position to interpose objections which would destroy the *prima facie* title of the plaintiff, but he is not in such position. The following authorities sustain this doctrine: *Union P. R. Co. v. Durant*,

95 U. S. 576, 24 L. ed. 391, from which we quote: "The position assumed by the trustee in this case is not unlike that of one who, having deprived the owner of the possession of his property, when called to account civilly or criminally, should insist that the owner's title was fatally tainted with fraud, and that hence the offender had the right to 'take and carry away,' and keep and enjoy the property himself with impunity." See also *Fidler v. Norton*, 4 Dak. 258, 30 N. W. 128, 32 N. W. 57; *Ingram v. Mitchell*, 30 Ga. 547; *Miltenberger v. Cooke*, 18 Wall. 421, 21 L. ed. 864; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *White v. Franklin Bank*, 22 Pick. 181; *Webb v. Fulchire*, 25 N. C. (3 Ired. L.) 485, 40 Am. Dec. 419; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343,—the gist of these decisions being that an agent or attorney is estopped to set up any imperfection in the title of the person for whom he holds in trust.

We thus reach the conclusion that plaintiff's title, fair upon its face, and not subject to attack from Lynn, is sufficient to sustain this action.

(2) It was argued in the trial below, and also in this court, that the evidence discloses gross fraud upon the county of Emmons in the sale to the land company of the tract at less than the amount of the taxes held against them. We will discuss this but briefly to say that the evidence fails to substantiate this accusation. The county was in urgent need of money. The county commissioners had advertised the lands for sale, and had written letters to various land companies in an effort to obtain a bid for the same. Mr. Boynton went to Linton to make an investigation, and while there he and their local agent drove over the lands and made inquiries regarding the titles. When the bids were opened it was found that there was a conflict therein. Mr. Boynton had bid upon all of the lands of the county, while a Mr. Beiseker had bid upon some 3,000 acres in which he had an interest, and other persons had bid upon individual tracts. It seems to have been the policy of the commissioners to allow the owners of the land to redeem from the tax sale in preference to selling the same to some outsider, and therefore the Hackney-Boynton bid was rejected and the other bidders allowed to take the tracts desired. Mr. Boynton insisted that those persons had taken the cream of the land, and refused to accept the balance *pro rata*. It is undisputed that he went to his hotel, and seemed to lose interest in the lands. The county commissioners, after waiting in vain

for his return, sent for him and attempted to secure a bid for the remainder of the lands. Mr. Boynton finally made such a bid, and it was accepted. It is undisputed that the land company had just purchased something over 200,000 acres of land in Emmons county from the Northern Pacific Railway Company with a perfect title, at the sum of \$1.05 per acre, and that most of such land was still unsold. The evidence discloses considerable reluctance upon the part of Mr. Boynton to pay even \$1.32 an acre for the Emmons county lands, upon the title which they had to offer, and we consider it too improbable for serious consideration that any of the officials of Emmons county were bribed, directly or indirectly, in the transaction.

(3) The next consideration will be given to the question of the nature of the decree obtained by the land company quieting title to the said tracts. It is urged by respondent that the summons in those suits failed to show whether or not the complaints were filed with the clerk of the district court, and that therefore the proceedings were utterly void. This question can only be raised by someone having an interest in the lands, and under the holding of this opinion Mr. Lynn is not such a person.

(4) We now reach the question of the title of defendant. It is the contention of appellant that Lynn is an involuntary trustee of the title for its benefit, for the reason that he acted as state's attorney for Emmons county in the proceedings that led up to the issuance of the deed of Emmons county to the Hackney-Boynton Land Company. In this we think appellant is correct. It appears from the evidence that Mr. Lynn has acted as state's attorney of Emmons county at various times since 1892, and is now acting as such state's attorney for the twelfth year. He received a salary during all of this time, and was acting as such state's attorney in the year 1901, when the land was sold by Emmons county to the Hackney-Boynton Land Company. As such it was his duty to advise the other county officials upon matters relating to the legal affairs of the county, and such advice was sought and given relative to this very transaction, as appears from the testimony of several of the county officials. Mr. Lynn advised the county commissioners that they had legal right to sell these lands, and prepared a form of warranty deed therefor; he drew up for their use the form of deed actually used in this transaction, and he personally superintended the

drawing up of the resolutions passed by the county board authorizing the deed. If a private person had employed Mr. Lynn under the same conditions, we do not apprehend that there would be much difficulty in reaching the conclusion that he might not acquire any title hostile to such client. The deed which Mr. Lynn helped to prepare for the county to issue is the very deed now being attacked by him. If the attack is successful, Emmons county will have to respond to the Hackney-Boynton Land Company in a sum considerably in excess of \$10,000. We think it plain that the state's attorney of the county owes to that county a duty to refrain from buying antagonistic titles, or instituting proceedings that will result in costs to his client. For this reason we hold that Mr. Lynn could acquire no title hostile to Emmons county, and such title as he acquired inured to the benefit of Emmons county and its grantee. The rule is stated at 4 Cyc. 958, as follows: "An attorney can in no case, without the client's consent, buy and hold otherwise than in trust any adverse title of interest touching the thing to which his employment relates." And at 3 Am. & Eng. Enc. Law, 2d ed. 344: "If he [the attorney], after being employed to draw a deed or examine the title to certain lands, buys an outstanding title to the land, adverse to that of his client, . . . he buys it for his client, and the latter may elect to take it on reimbursing the attorney. An innocent purchaser from the client is entitled to all the equities existing in favor of his assignor." *Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422, from which we quote: "Such transactions are not held to be void upon the ground of intentional fraud or proven bad faith, but because the relations of the parties are such that the one may make use of his position of power and influence over the other, or of his superior knowledge derived while in the employment of the other, to take an unfair advantage of him." *Re Freerks*, 11 N. D. 120, 90 N. W. 265; *Henry v. Raiman*, 25 Pa. 354, 64 Am. Dec. 703; *Baker v. Humphrey*, 101 U. S. 494, 25 L. ed. 1065; *Sanford v. Flint*, 108 Minn. 399, 122 N. W. 315; *Downard v. Hadley*, 116 Ind. 131, 18 N. E. 457; *Galbraith v. Elder*, 8 Watts, 81; *Ainsworth v. Harding*, 22 Idaho, 645, 128 Pac. 92.

The fact that the client in this case was the county, and not an individual, in no manner lessens the duty of the attorney nor changes his position as trustee.

Actual fraud need not be shown, nor any intentional violation of the trust. It may be conceded that Mr. Lynn believed he had a right to buy those outstanding titles after his term as state's attorney had expired; the law in its wisdom says he must not, and if he does, it will conclusively presume that he acted for the county.

(5) We next approach the question of the employment of Mr. Lynn by the Hackney-Boynton Land Company. The facts relative to this matter are not seriously in dispute, but the legal effects of the facts are differently construed by the parties. As already mentioned, the Hackney-Boynton Land Company in March, 1902, instituted suits to quiet title to the lands they had bought from Emmons county, and just prior thereto they wrote to Mr. Lynn the following letter:

March 3, 1902.

G. W. Lynn, State's Attorney of Emmons County,
Linton, N. D.

Dear sir:—

We would like to have you do a little work for us at the county office at Linton in connection with the tax title lands which we purchased from Emmons county sometime ago. We inclose herewith the requirements of our attorneys. We do not want to go to the expense of sending an attorney to Linton, and thought we could get you to do the work instead. Will you look over the records carefully, and report each item as fully as possible and as soon as possible, sending in your bill?

Yours truly,

(Signed) Hackney-Boynton Land Company.

In reply to this letter, Mr. Lynn wrote as follows:

March 12, 1902.

Hackney-Boynton Land Company,
St. Paul, Minn.

Kind sirs:—

Replying to your of the 3d, will say in answer to the first question of the schedule herein returned, that the certificates do not show any compliance with section 12 of chapter 67, Laws of 1897, as regards the posting and publishing of notices, but the same was done, and the

sheriff, Peter Shier, will so state; also the then treasurer, H. W. Allen, who has personal knowledge of the facts. In answer to question three will say that the delinquent list is on file in the clerk of court's office, the same being in book form, and bears filing mark of August 19, 1897. Have examined the certificates in each tract, and they are all alike, being made after the form in § 14, chapter 67, Laws of 1897; fees for examination \$10.

Yours,

(Signed) G. W. Lynn.

Defendant states that he does not consider that he was employed as an attorney, and that was undoubtedly his honest conviction. However, when it is remembered that even this short employment gave Lynn notice of Hackney-Boynton's intention to bring the suit, the name of the defendants who were also the former fee holders, and that the affidavit of publication must disclose their residences, if known, it is apparent that very much of the information which he acquired was also usable by him in obtaining the quitclaim deeds upon which his claim to title rests. When it is remembered also that this letter was dated March 2, 1902, before any of the quitclaim deeds had been obtained by Lynn, it shows a connection of more than passing importance. While these circumstances alone might not be enough to create a trust in favor of the land company, yet, taken in connection with the duty he owed to Emmons county to do nothing to injure his client, we think it a circumstance corroborating the holding in the preceding paragraph.

(6) The next question for discussion is the effect of the suits brought by Lynn, and the stipulation of facts entered into by Cochrane & Philbrick upon their behalf. It is conceded that such stipulation admits that Mr. Lynn was the owner of the lands unless he had been divested by the proceedings under the Wood law. While courts are loathe to disturb stipulations of the parties, yet circumstances can and often do arise where relief is granted from an improvident stipulation. We think this is a case for the exercise of this clemency. It is true that the land company knew of the employment by them of Mr. Lynn, and of the fact that he was state's attorney of Emmons county, but it did not know of the facts relative to his acquisition of the land. Had they known all of the facts, which will be discussed in the next paragraph of this opinion, they would probably have insisted upon a different stipu-

lation. That Lynn was not the owner of the lands at the time the stipulation was made is abundantly shown by the evidence. Several of the quitclaim deeds were obtained from persons who had already parted with what title they had, to other persons. One of the deeds had been altered, slightly, perhaps, to show a different grantee than intended by the grantor. Two of the titles were based upon void foreclosures, one of which has been since abandoned by Mr. Lynn. And many of the conveyances were obtained for a mere nominal consideration, upon representations that the deeds were intended to clear the record title, which will be treated in the next paragraph. Under those facts the stipulation that Mr. Lynn was the owner of the land unless he had been divested by the proceedings under the Wood law was an imposition upon the trial court. Moreover, the trial court had already entered a decree quieting title to those very lands in favor of the land company, and, Mr. Lynn not being in a position to make any attack upon that decree, the same was binding upon all parties to the second suits.

(7) The seventh paragraph will be devoted to treating the correspondence between Mr. Lynn and the grantors in the various quitclaim deeds. We are obliged to treat evidence given in all of the cases, because parts of the land obtained by Lynn from a single grantor have passed to different members of the firm of Hackney-Boynton Land Company upon the division of their assets. In the Patterson Case are the following lands: N $\frac{1}{2}$ and SE $\frac{1}{4}$, 35-135-76, purchased from Elvidge for \$50; SW $\frac{1}{4}$ 13-135-78, for which he paid Dr. Goodhue \$15; S $\frac{1}{2}$ of 9-135-76 for which he paid Mellon \$25; NW $\frac{1}{4}$ 15-136-75 purchased from W. E. Wright for \$31.25; SW $\frac{1}{4}$ of 12-130-79 obtained for \$50 upon foreclosure proceedings against one Haka; S $\frac{1}{2}$ SW $\frac{1}{4}$ of 21 and NE $\frac{1}{4}$ NW $\frac{1}{4}$ and lot 2, 28-130-79 obtained upon mortgage given by Parkhurst; SE $\frac{1}{4}$ 27-135-77 for which \$100 was paid to Joseph Tape; E $\frac{1}{2}$ 15-136-75 for which he paid Wright \$62.50; SW $\frac{1}{4}$ 19-136-77 for which \$250 was paid Collins; lots 2, 3, and 4 section 2, 136-76 bought of Gutjahr. In this connection it must be remembered that those original owners had long since abandoned the land and had paid no taxes thereon; that they made no claim to ownership in the land, and all of the conveyances were by quitclaim deeds, and not by warranty deeds; that while Hackney-Boynton Land Company had made

no extensive improvements upon the land, nor entered into actual physical possession thereof, they had listed them with its local agency, and was showing them to prospective purchasers, and selling the hay thereon, and had quieted title thereon in the courts. It must also be remembered in this connection, the letter which Mr. Lynn had written to Dunton, and given earlier in this opinion, which shows his conception of the transactions, and wherein he speaks of a plan "in which he would divide the spoils." Taking up the tracts individually, we find Lynn's first letter to Elvidge, dated January 27, 1905, and it reads as follows: "You will perhaps remember that back in the year 1885 you purchased some land in this county, and that for a long time you haven't paid any taxes upon the same. This land has been sold for taxes several times, and in 1897 the land was sold under tax judgments for past two years, and the same was bid in by our county. The county in the year 1899 sold the same by deed of warranty to a certain land company, who quieted their title by an action in our courts in the year 1902. Now, I desire to make a purchase of this land. While our courts of final resort have upheld the title of the land company acquired in this way, and their title is probably good, yet I desire to get your quitclaim to the said lands. I do not consider that you have much of a title to sell, and cannot give you much for the same. However, I have prepared a quitclaim deed, and inclose the same herewith, and if you will execute the same before a notary public, and deposit the same in your bank for collection, and notify me of the name of the bank, I will send you \$25 to the bank designated. This will compensate you for your trouble, and it is all that I can afford to give. Of course, you understand that in giving this kind of a deed you do not in any wise bind or obligate yourself in the least, simply releasing any title you may have. Please attend to this at once, as I desire to get the same closed up as soon as possible. (Signed) George W. Lynn."

In reply he received the following letter, dated February 17, 1905: "Yours of January 27, 1905, referring to lands bought by me in 1885 in Emmons county, received and contents noted. Have decided to fill out and sign quitclaim deed if you will send draft for \$50 to Avalon Bank, Avalon, Alleghany county, Pennsylvania, with instructions to bank to transfer the amount to me in exchange for the signed paper referred to. Please advise me of your decision, and if satisfactory will

have the paper acknowledged and ready for return to you. (Signed) Frank H. Elvidge." This proposition was accepted by Lynn. In February, 1905, Lynn wrote to Mellon as follows: "About twenty years ago you bought and was the owner of a half-section of land in this county, but later you failed to pay the taxes on the same, and the same was sold for taxes under a tax judgment, and the same became the property of this county in 1897, and period of redemption expired in the year 1899. In the year 1902 the county sold the same to a land company by warranty deed. Said land company quieted their title to the same in the year 1902. Of course, your former title stands as a cloud on the same. I desire to know what you will take for a quitclaim of the same? Let me know at your earliest convenience. (Signed) George W. Lynn." In his letter to Wright he says: "About twenty-four years ago you bought from the Northern Pacific Railroad a section of land in this county, and you abandoned the same, and did not pay taxes on the same, and it has passed under tax title years ago. Also the title has been quieted as against your claim. Now there is no doubt but that you have lost all hold on the land, and your title has been divested, but I desire to know if you will execute a quitclaim deed to the premises for a nominal amount of \$25? . . . (Signed) George W. Lynn." To Mrs. Bussy he wrote in part: "I could not give over a nominal sum for it, for it is wanted merely to clear up a record title, as the same has long ago passed to a perfect tax title." To one Horrigan he wrote relative to the Collins land, as follows: "At one time one J. N. Collins was the owner of a parcel of land in this county, and later abandoned the same, and it is now in the hands of other parties, but the records still stand clouded by the former record of title. . . . Now I can afford to give \$25 to get his release or quitclaim of any rights he may have in the land." These samples show the general nature of the correspondence had with the former owners of said tracts. The depositions of those various grantors which were taken during the course of the trial disclose that they understood they were giving the quitclaim deeds to clear up the record title, and did not suspect that Mr. Lynn would assert ownership based upon the quitclaim deeds which they had executed to him.

It is apparent that Mr. Lynn was endeavoring to obtain what he considered a perfect title to the land, subject only to a lien for taxes

under the Wood law, and in so doing he concealed from the grantors his true purpose and intention. While those grantors are not parties to this suit, and make no complaint, still we think Mr. Lynn's conduct should be considered in determining whether he was in law an involuntary trustee for the benefit of Emmons county. As we have already reached the conclusion that he was debarred from obtaining title hostile to that held by Emmons county, this paragraph can be considered merely as strengthening the conclusion already announced, that Lynn was estopped from acquiring or asserting an interest in the premises adverse to the county of Emmons or its grantees. *Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422, and cases therein cited; *Re Freerks*, 11 N. D. 120, 90 N. W. 265; *Gates v. Kelley*, 15 N. D. 639, 110 N. W. 770; *Reid v. Stanley*, 6 Watts & S. 369; *Doster v. Scully*, 27 Fed. 782; *Smith v. Brotherline*, 62 Pa. 461; *Sutherland v. Reeve*, 41 Ill. App. 295; *Gibbons v. Hoag*, 95 Ill. 45; *Davis v. Kline*, 96 Mo. 401, 2 L.R.A. 78, 9 S. W. 724; *Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891; 11 Cyc. 647 and cases cited. Not only was Lynn forbidden under those authorities to acquire a title hostile to Emmons county and its grantees, but he was forbidden under the statutes of the state from making such purchases. See Rev. Codes 1905, §§ 8732-8739, 8744; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035; *Steere v. Steere*, 5 Johns. Ch. 1, 9 Am. Dec. 256.

(8) The foregoing paragraphs show that the defendant, Lynn, is an involuntary trustee for the benefit of Emmons county and its grantees, and the plaintiffs have offered to reimburse him for all moneys expended in obtaining the titles aforesaid. Upon the payment to Mr. Lynn of such amounts, plaintiffs are entitled to receive from Mr. Lynn a transfer of the title which he has acquired therein.

(9) Two of the quarter-sections involved in this litigation were acquired by Mr. Lynn under slightly different circumstances. Instead of obtaining quitclaim deeds from the owners he purchased mortgages given by such former fee owners, and foreclosed thereon. While this title is slightly different, it is no stronger than the others. The Wood law contained the provision that the judgment for taxes should convey the entire title to the land, thus shutting out both the fee owner and all encumbrances.

(10) Another question arising is the correctness of the order of the

trial court in refusing to allow an amendment to the complaint setting up the facts herein stated, relative to Mr. Lynn's having acted as state's attorney, his having acted as attorney for Hackney-Boynton Land Company, and the fact that his deeds were obtained for a nominal consideration and upon alleged misrepresentations. Those allegations were not contained in the original complaint at the time of the commencement of the trial. During the course of the trial the plaintiff asked permission to make the amendment above outlined stating their nature fully. The trial court made no ruling until after the completion of the trial, when the amendments were denied. We have already held it to be the duty of the trial court to rule upon such questions when presented, even in cases tried under the so-called Newman act. At the time the attempt was made to amend the complaint it was shown by affidavit that the new facts sought to be proven had just been discovered. Under those circumstances, and in view of the fact that no prejudice had resulted to defendant because the trial was still in progress and he had ample time within which to meet the issues, the amendments should have been allowed, and they are treated upon this appeal as though the same had been allowed.

From the foregoing it is evident that the order of the trial court herein must be reversed, and a decree entered ordering the defendant Lynn to transfer the lands in controversy to the Patterson Land Company upon their paying to him the several amounts which he has expended therefor, including a reasonable sum to be allowed by the trial court to cover his expenses incident to obtaining the titles aforesaid, and such taxes as he has paid thereon, and any improvements which he may have placed upon the premises; and that upon a failure of defendant to execute such deed, to make and file a decree operating to transfer such title.

IN THE MATTER OF THE ESTATE OF JOHN D. GRAY,
Deceased.

JOHN HENDERSON et al. v. JULIA ANN GRAY et al.

(— L.R.A.(N.S.) —, 146 N. W. 722.)

Will — devise — testator's intention — life interest — real property — unconditional estate — charge impressed on property — subject to — legacy — payment — security.

1. In paragraph 2 of his will, testator devised a life estate in all his real property to his wife, and in paragraph 3 he made the following devise to his son Arthur:

"Subject to the aforesaid life interest of my wife, Julia Ann Gray, and the following further provisions: (a) That within two years next succeeding the death of my wife, Julia Ann Gray, he pay or cause to be paid unto by daughter, Ruth Beale, or her heirs, the sum of fifteen hundred dollars (\$1,500.00); (b) that he pay or cause to be paid unto my daughter Myra Fieldman, or her heirs, within two years next succeeding the death of my wife, Julia Ann Gray, the sum of fifteen hundred dollars (\$1,500.00). I will and bequeath unto my son, Arthur Pierce Gray, or his heirs, the north one-half of section twenty-eight, township one hundred forty, range sixty."

No provision is made in the will for a devise over in the event Arthur should decline to accept such devise.

Held, construing the will in its entirety, that the testator's intention was to vest in such son an unconditional estate in such property at his death, subject to the life estate in his widow, and subject, further, to a charge impressed thereon in favor of his two daughters, Ruth and Myra, as security for the payment to each, within two years from the death of his widow, of the legacy therein bequeathed.

Devise — condition precedent — power of alienation — suspension.

2. Such devise to the son not being made subject to a condition precedent, there is no basis whatever for the contention of respondents that the same operates to suspend the power of alienation.

Note.—As to the remedies for the enforcement of a legacy when charged on devise, see note in 30 L.R.A.(N.S.) 815.

On the question of the admissibility of extrinsic evidence for purpose of charging property with payment of legacies or debts where the will is silent on that point, see note in 19 L.R.A.(N.S.) 457.

27 N. D.—27.

Rules of construction — aids to courts — intention of testator — effect to, must be given.

3. Certain well-settled rules of construction are referred to and applied in the opinion, all of which were designed as aids to the courts in determining and giving effect to the real intent of the testator, which in all cases is the sole object in view.

Opinion filed March 30, 1914. Rehearing denied April 13, 1914.

Appeal from District Court, Barnes County; *J. A. Coffey, J.*

From a final order adjudging void certain provisions of a will devising real property, upon the ground that the same operate to unlawfully suspend the power of alienation, the petitioners for the probate of such will appeal.

Reversed.

Page & Englert, for appellants.

The will here in question does not operate to suspend the power of alienation. *Hagen v. Sacrison*, 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518; *Robert v. Corning*, 89 N. Y. 226; *Dillenbeck v. Dillenbeck*, 134 App. Div. 720, 119 N. Y. Supp. 134; *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869; *Garvey v. McDevitt*, 72 N. Y. 556; *Re Heberle*, 155 Cal. 723, 102 Pac. 935; *Re Pforr*, 144 Cal. 121, 77 Pac. 825.

The devise to the son was subject to the life interest of the widow, and is an unconditional estate. *Torpy v. Betts*, 123 Mich. 239, 81 N. W. 1094; *Murphy v. Whitney*, 140 N. Y. 541, 24 L.R.A. 123, 35 N. E. 930.

The absolute power of alienation is not suspended, because there were at all times persons in being who could convey an absolute fee in possession. *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869; 18 Am. & Eng. Enc. Law, 377; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Case v. Green*, 78 Mich. 540, 44 N. W. 578; *State v. Holmes*, 115 Mich. 456, 73 N. W. 548.

The testator had the right to select the life that should measure the period of suspension. *Crooke v. King County*, 97 N. Y. 421; *Bailey v. Bailey*, 97 N. Y. 460; *Chaplin, Suspension of Power of Alienation*, §§ 222, 227, 230; *Case v. Green*, 78 Mich. 540, 44 N. W. 578.

The absolute power of alienation is not suspended in violation of the

statute of perpetuities so long as there are persons in being by whom an absolute interest in possession can be conveyed. Rev. Codes 1905, § 4745; *Torpy v. Betts*, supra; 18 Am. & Eng. Enc. Law, 377; *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869; *Garvey v. McDevitt*, 72 N. Y. 556; *Nellis v. Nellis*, 99 N. Y. 505, 3 N. E. 59; *Murphy v. Whitney*, 140 N. Y. 541, 24 L.R.A. 123, 35 N. E. 930; *Baldwin v. Palen*, 24 Misc. 170, 53 N. Y. Supp. 520; *Re Campbell*, 149 Cal. 712, 87 Pac. 573; *Fitz Gerald v. Big Rapids*, 123 Mich. 281, 82 N. W. 56.

Where the beneficiaries are some permanent institution, or one to be created, and not natural persons in being, such provisions are void. *Murphy v. Whitney*, 140 N. Y. 541, 24 L.R.A. 123, 35 N. E. 930; *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869; *Fitz Gerald v. Big Rapids*, supra.

If there are in existence persons who, by joining in a conveyance, or by successive releases, are able to pass the whole estate, the law is complied with. 18 Am. & Eng. Enc. Law, 377; *Rong v. Haller*, 109 Minn. 191, 26 L.R.A. (N.S.) 825, 123 N. W. 471, 806; *State v. Holmes*, 115 Mich. 456, 73 N. W. 548; *Rose v. Rose*, 4 Abb. App. Dec. 108; *Yates v. Yates*, 9 Barb. 324; *Fitz Gerald v. Big Rapids*, supra; *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938; *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. 869.

The amounts to be paid other beneficiaries by the beneficiaries under the will are mere charges upon the land. *Radley v. Kuhn*, 97 N. Y. 26; 30 Cyc. 1504.

Taylor Crum, for respondent.

The creation of the limitation or condition in a will takes place at the death of the testator. The absolute power of alienation is equivalent to the power of conveying an absolute fee. *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 776; *Tucker v. Tucker*, 5 N. Y. 417.

Any conveyance by the heirs would be liable to be defeated by the nonexercise of the conditions precedent imposed upon the sons. The executors could not convey an absolute title in fee. The will is illegal. *Garvey v. McDevitt*, 72 N. Y. 564.

By the terms of the will there is left a period of two years, during which the power of alienation might be suspended. *Cruikshank v.*

Home for the Friendless, 113 N. Y. 337, 4 L.R.A. 140, 21 N. E. 65; Haynes v. Sherman, 117 N. Y. 433, 22 N. E. 939.

The only persons who can convey a complete title are those who are actually in being at the time when the sale is made. Trowbridge v. Metcalf, 5 App. Div. 318, 39 N. Y. Supp. 245.

In the case at bar, there are conditions precedent which are uncertain of fulfilment. State v. Holmes, 115 Mich. 456, 73 N. W. 549; Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 239; Leonard v. Burr, 18 N. Y. 107; Cruikshank v. Home for the Friendless, 113 N. Y. 337, 4 L.R.A. 140, 21 N. E. 64; Rong v. Haller 109 Minn. 191, 26 L.R.A. (N.S.) 825, 123 N. W. 471, 806; Re Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 777; Crew v. Pratt, 119 Cal. 139, 51 Pac. 42; Whitney v. Dodge, 105 Cal. 197, 38 Pac. 636.

The duration of designated lives must always be, and be made, the ultimate measure of duration. Other measures may be adopted, but it matters not, so long as they cannot extend the period of suspension beyond designated lives. Re Hendy, 118 Cal. 657, 50 Pac. 753; Re Cavarly, 119 Cal. 406, 51 Pac. 630; Hawley v. James, 16 Wend. 120.

FISK, J. In April, 1911, one John D. Gray died testate, leaving certain real and personal property in Barnes county. The provisions of his will, so far as material to the questions presented, are as follows:

"II. Unto my wife, Julia Ann Gray, I will and bequeath all of the personal property in my possession at the time of my death and a life interest in and to my real estate, more particularly described as the north one-half of section twenty-eight, and the southeast one-fourth of section twenty-one, all in township one hundred forty of range sixty in Barnes county, North Dakota (N. $\frac{1}{2}$ 28, and S.E. $\frac{1}{4}$ 21-140-60), it being my wish and direction that she retain full possession and enjoy the income from said real estate during the period of her natural life, but this interest and title shall terminate promptly at her death.

"III. Subject to the aforesaid life interest of my wife, Julia Ann Gray, and the following further provisions: (a) That within two years next succeeding the death of my wife, Julia Ann Gray, he pay or cause to be paid unto my daughter, Ruth Beale, or her heirs, the sum of fifteen hundred dollars (\$1,500); (b) that he pay or cause to be paid unto

my daughter, Myra Pieldman, or her heirs, within two years next succeeding the death of my wife, Julia Ann Gray, the sum of fifteen hundred dollars (\$1,500), I will and bequeath unto my son, Arthur Pierce Gray, or his heirs, the north one-half of section twenty-eight, township one hundred forty, range sixty, (N.½ 28-140-60).

"IV. Subject to the aforementioned life interest of my wife, Julia Ann Gray, and the further provision that within the two years next succeeding the death of my wife, Julia Ann Gray, he pay or cause to be paid unto my son, James Burley Gray, or his heirs, the sum of five hundred dollars (\$500), I will and bequeath unto by son, George H. Gray, the southeast quarter of section twenty-one, in township one hundred forty, of range sixty (S.E.¼ 21-140-60)."

Thereafter a petition in due form was presented to the county court for the probate of such will, and one Rachel M. Zellers, a daughter of the deceased, opposed the allowance of such probate upon the ground, among others, "that said alleged will is void, as the intent of the testator to give the remainder in fee to heirs of Julia Ann Gray is legally impossible, as the intention of the testator would put the freehold in abeyance; that no provision is made for any disposition of the decedent's real estate in case Arthur Pierce Gray and George H. Gray, or either of them, fail to pay certain money to other heirs at law; and that there is an attempt to suspend alienation longer than the continuance of the lives in being at the testator's death. For a period of two years after the death of Julia Ann Gray, the real estate attempted to be devised might belong to no one, there being no devisee who has not attained his majority, as appears by the petition for proof and probate of the alleged will."

The county court overruled such objection and allowed the probate of the will, from which decision Rachel M. Zellers appealed to the district court, which court reversed the decision of the county court, holding such will of no validity in so far as the testator attempted to devise the real property therein described. From such decision this appeal is prosecuted.

Counsel, in their original briefs and orally, argued the case mainly upon the assumption that the devises to Arthur Pierce Gray and to George H. Gray were subject to *conditions precedent*, and that as a consequence the decision must turn upon the question of law as to

whether by paragraphs 3 and 4 of the will the testator attempted to suspend the power of alienation for any period in excess of that permitted by the Code, §§ 4744 and 4745, which are as follows:

"Sec. 4744. The absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in § 4772."

"Sec. 4745. Every future interest is void in its creation, which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

Appellants' counsel earnestly contend that under the paragraphs of the will aforesaid the power of alienation is not unduly suspended contrary to § 4745. Numerous authorities are cited and relied upon in support of their contention, but their chief reliance is upon the case of *Torpy v. Betts*, 123 Mich. 239, 81 N. W. 1094, decided under a statute in all respects like the statutes of North Dakota above quoted.

We shall not take the time nor the space necessary to enable us to analyze such case, nor any of the cases cited in the original briefs, for we do not deem them in point, nor in any respect controlling in the case at bar. We merely remark, in passing, that upon the law point argued we would have no difficulty in reaching a conclusion favorable to the respondent.

After careful consideration of the case we become impressed with a belief that counsel had overlooked and failed to brief and argue what we were inclined to deem the controlling rule of construction; viz., that the devises to Arthur Pierce Gray and to Geo. H. Gray were not upon condition either precedent or subsequent, but that the same were unconditional and made subject merely to a charge in favor of the legatees, Ruth Beleal, Myra Pieldman, and James Burley Gray. Thereupon we requested counsel to furnish supplemental briefs upon this phase of the case, which request has been complied with. A careful consideration of such supplemental briefs has served to confirm the correctness of our first impressions. As we construe the will, the premise upon which both counsel first argued the case in this court, to wit, that such

real property was devised to the sons, Arthur Pierce and George H. Gray, upon *conditions precedent* that they should pay certain bequests to Ruth Beale and Myra Fieldman, daughters, and to James Burley Gray, a son of the testator, is clearly erroneous. If correct in this conclusion it necessarily follows that such devises were made either upon conditions subsequent or merely subject to a charge upon the estates devised in favor of such legatees for the amounts of such legacies, and in either event the question argued in the original briefs, of the suspension of the power of alienation, cannot possibly be involved. We are firm in the belief that the testator merely intended to make such legacies charges against the estates. We are confirmed in this belief by the provisions of the will. On the theory that the testator intended to make such devises subject to *conditions precedent*, it is quite natural that he would have made some provision for the vesting of title elsewhere in the event such conditions were not complied with, but the will is silent in this respect. Furthermore, such conditions could not be complied with until after the termination of the life estate in the mother, for such are the plain provisions of the will; and yet no provision is made for an abiding place for the title during the interim between the mother's death and a compliance with such conditions, which might be a period of two years. If held to be conditions precedent, it is, of course, well established that no estate could pass to the devisees until the conditions were complied with. Again, it clearly was testator's intent to bequeath to Ruth Beale, Myra Fieldman, and James Burley Gray the sums stated, yet such intent must fail if the devises to Arthur and George fail either through noncompliance with the alleged conditions precedent, or otherwise. Moreover, the fact that the testator fixed a period of two years from and after the death of the mother in which such legacies could be paid by Arthur and George to Ruth, Myra, and James, lends support to our construction of the will, for it is very improbable that the testator, if he intended to withhold the vesting of such estates in Arthur and George during the interim which might occur, would not have made some provision for the occupancy and control, as well as the ownership, of the property during such period. When we consider the entire will with a view of determining the intention of the testator, which is the sole object aimed at, we are forced to conclude that, subject to the life estate in the mother,

the devises operated to vest title in Arthur and George unconditionally at the death of the testator, but that they took thereunder subject to a charge impressed upon their estates for the payments of the legacies aforesaid within two years after the mother's death. Well-settled rules of construction, as well as the authorities, lend ample support to our views. Brief reference to such rules and to a few authorities will here be made.

Page on Wills, § 461, announces a correct rule of construction as follows: "The sole object and intention of the rules upon the subject of construction is to ascertain the intention of the testator. As was said by Chief Justice Marshall: 'The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail.'"

"The purpose of the court in construing a will is solely to ascertain the intention of the testator as the same appears from a full and complete consideration of the entire will.

"The intention of testator is said, in a recent Virginia case, to be the 'life and soul of a will,' and if this intention is clear, and is not in violation of any rule of law, it must govern with absolute sway."

In § 465 this author also says: "Testator will be presumed to know the limits imposed by law upon his testamentary power, and to strive to comply with those limits. Thus, if one construction of the will will cause it to violate the rule against perpetuities, and another construction will make it comply with this rule, the construction which makes it comply with this rule will be preferred." And in § 466 we quote: "It will be presumed that a person when he makes and publishes a will intends to dispose of his whole estate, unless the presumption is rebutted by its provisions or evidence to the contrary." And in § 752 we quote the following: "Devises are often made to one with the direction that he pay a certain sum to another. Whether the sum thus to be paid is made a charge upon the land by such gift is a question involving some difference of judicial opinion; but it can, in general, be determined by the same principles as those which determine whether a direction to support is a charge upon property devised or not. A gift to one, subject to the payment of a specified amount to another, is held to make the payment of such amount a charge upon the land devised.

. . . Gifts of this sort are held to impose charges on the land devised, rather than to constitute conditions precedent, when there is no gift over in case of failure to pay the beneficiary designated. In cases of doubt the presence or absence of a gift over is held to determine whether the will creates a charge or imposes a condition precedent."

See also Rood, Wills, § 623.

In 40 Cyc. 1683, we find the following accurate statement relative to how a condition in a will can be created: "To create a condition in the case of a devise or bequest, apt words to that end must be used. It is not necessary, however, that any particular form of words shall be employed, but whenever it clearly appears from the language used, aided, it may be, in a proper case, by extrinsic evidence, that it was the intention of the testator to impose a condition precedent or subsequent, such intention will be given effect. On the other hand, even the use of the words 'upon condition,' although they are of course most appropriate, will not create a condition if a contrary intent appears from the will. The intention to create a condition must clearly appear, for the courts will not construe a testator's words as importing a condition of a different meaning can be fairly given to them,"—citing numerous authorities in support of the text.

At page 1697 of the same treatise the author distinguishes a condition from a charge or trust in the following terse language: "The doctrine has been announced in many cases that a condition for the benefit of a person, particularly where it is a mere direction enjoining some act upon a devisee or legatee, without any expressed or clearly implied intention that its breach shall work a forfeiture of the estate, should be regarded as creating a charge or trust upon the land or fund in such person's favor, to be enforced as other charges and trusts, and not as a limitation upon the estate or interest devised, even though the words used may indicate a condition."

The adjudicated cases are very numerous in support of the rules of construction above quoted. We will review briefly some of these cases.

A very similar case to the one at bar arose in Vermont, and is reported in 55 Vt. 518. Taft, J., in speaking for the court, said: "The right of the plaintiff to maintain this action depends upon whether he took under his father's will the legal estate in the premises sued for. His father devised the premises to the plaintiff for life, with remainder

to the plaintiff's children, upon the express condition that the plaintiff paid to his brother Michael \$700 on or before the 1st day of April after the testator's death. That sum has never been paid; and the defendant insists that the legal title to the premises has never vested in the plaintiff. There are cases in our sister states which hold that such conditions are conditions precedent, and that no title to the lands devised vests until the conditions are performed. Such may be the rule in the construction of deeds and contracts; but great latitude has been exercised by the courts in the construction of wills. 'It has been held that that which may be a condition precedent in a deed may be a condition subsequent in a will.' *Jennings v. Gower*, Cro. Eliz. pt. 1, p. 219. And the rules of construction are so liberal that it has been held that 'no precise form of words is necessary to create conditions in wills; but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect.' 2 *Williams*, Exrs. 1081. The case at bar should not turn upon any technical construction to be given the words used. The great object is to come at the intention of the testator. Nice grammatical constructions, which lead aside from this grand object, are to be disregarded. The testator provided some of his children with homes,—those, it is said, who were living in this state,—distributing his real property among them. He gave Michael, living out of the state, \$1,000 requiring the plaintiff to pay \$700 of it, and giving the plaintiff his home farm on condition that he should pay it on or before the 1st day of April after the testator's decease. It was the evident intent of the testator that upon his death the plaintiff should be vested at once with the title and ownership of the farm, that the payment of the \$700 should be charged upon it, and that it should be held subject to such equitable lien. This is the construction that we think should be given to the will. It could not have been the testator's intent that in case he had died on the last day of March that the devisee should lose all benefit of the gift in case he did not pay the \$700 the next day. The plaintiff therefore had a sufficient title to maintain ejectment."

The supreme court of Michigan in *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513, in speaking to the point, said: "The fact ~~that~~ the testator makes no provision in regard to the disposition of the estate, providing the event named for a devisee or a legatee coming into full pos-

session never occurs, is regarded as satisfactorily showing that it was not in the mind of the testator to create a contingent estate.

"In *Eldridge v. Eldridge*, 9 Cush. 516, Shaw, Ch. J., defines the rule of construction upon this subject thus: 'When, therefore, words are equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself or to the time of payment, courts are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent.'

"In *Dingley v. Dingley*, 5 Mass. 537, Parsons, Ch. J., states the rule as follows: "For it is a rule of law that a remainder is not to be considered as contingent when it may be construed, consistently with the testator's intention, to be vested.'

"In *Smith's Appeal*, 23 Pa. 9, it was said: 'The law favors an absolute, rather than a defeasible, estate; a vested, rather than a contingent, one; a primary, rather than a secondary, intent.'

"In *Letchworth's Appeal*, 30 Pa. 175, it was held that the law always inclines to hold the whole interest in property as vested, rather than contingent; and therefore, in case of doubt, it declares the interest vested."

The following language from the supreme court of West Virginia is strikingly applicable to the case at bar: "He made no provision for their payment out of personalty, if there was any besides that given his wife, and it seems he owned no land besides that given his sons; and as he surely expected all these legacies, amounting to \$12,300, besides the annual legacy of \$500 to his wife, to be paid, we may ask, how could he expect them to be paid, except out of the land?" *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754.

The Iowa court in the very recent case of *Schrader v. Schrader*, — Iowa, —, 139 N. W. 160, speaking through Mr. Justice Weaver, announces a like rule as follows: "That the testator regarded it as a lien or charge, and not a condition precedent, is made evident by the fact that he did not attempt to devise the fee to anyone else, in case of George's failure to make the payment. . . . The fact that the will does not provide for a devise over to another on failure of the first-named devisee to perform the condition attached to the gift is by all authorities considered a circumstance of much weight, indicating that the condition is not precedent to the vesting of an estate." Citing

Cunningham v. Parker, 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635; Hoss v. Hoss, 140 Ind. 551, 39 N. E. 255; Hanna's Appeal, 31 Pa. 53; Percy v. Greenwell, 80 Ky. 616; Re Vandevort, 62 Hun. 612, 17 N. Y. Supp. 316.

The provisions of the will in the Iowa case were not materially different from those in the will before us.

A very similar will was before the Wisconsin court in the recent case, Korn's Will, 128 Wis. 428, 107 N. W. 659. The will in that case gave the testator's widow the use and income of all his real estate during her life, and "after the death of my said wife I dispose of my property as follows, to wit: "Third. I will, devise, and bequeath to my son William Korn my farm [description] upon the express condition, however, that he shall pay to my daughter, Phillipina Steele, the sum of five thousand (\$5,000) dollars within one year after the death of my said wife." Mr. Justice Dodge in speaking for the court said: "This naturally brings us to a consideration of the intent with reference to this legacy. The will does not, in terms, provide that the same should be a charge, but uses the expression that the devise to *William* is upon the condition that he shall, within one year after the widow's death, pay this amount to Phillipina. The expression 'upon condition,' if not otherwise qualified, might be construed as a condition precedent so that William could not take the land at all without making such payment, but since he was to take in possession immediately upon his mother's death, and was not required to make the payment until afterwards, namely, within a year, of course no condition precedent was intended. If, then, it is a condition at all, it is a condition subsequent; but there is no suggestion that his title is to be divested upon breach of that condition, and no provision is made for anyone else to take the land upon such breach. Hence, it seems necessary to deduce some other practical meaning and purpose from this language. We are persuaded that the trial court reached substantially the right conclusion on this subject. We think it plain that this \$5,000 provision for the daughter—all that she receives under the will—was a very dominant purpose in the mind of the testator, and that his wishes, as evidenced by the will, would not be satisfied unless she receives it; hence, that he intended to declare his will that out of this farm, constituting nearly half of his estate, should be paid, in any event, \$5,000 to the daughter Phillipina;

-that this purpose should not be defeated either through William's inability to raise that amount of money upon his limited estate therein, or otherwise. To reach this result he must have intended to confer upon her the right to a lien or charge for this amount upon the whole title in these premises, and we agree with the trial court in holding that the will does so. Such lien or charge being created, of course the right exists in her to invoke the powers of a court, whether of law or equity, to exert its proper machinery to render that lien effective in producing the money she is entitled to have. Courts of equity have many such methods within their power, prominent among which is the judicial sale, whereby any title or any portion found necessary may be transferred to a purchaser who will pay the amount of money requisite to satisfy the charge. We think it proper to declare, also, that, she being *sui juris*, her right to this legacy, with all its accompanying security, can be sold or transferred by her like any other property, so that anyone, other than William, paying to her the \$5,000 to which she is entitled may, with her co-operation, acquire all her rights in the land. We presume that the trial court intended to declare, by its judgment, a charge of this character, and no modification or change of the judgment, so construed, is necessary."

We are in entire accord with the reasoning and conclusion of the Wisconsin court in the above case, and adopt such reasoning in the case at bar.

See also McNally v. McNally, 23 R. I. 180, 49 Atl. 699, which is directly in point in support of our holding. The language in the opinion is so pertinent to the case at bar that we cannot refrain from quoting therefrom: "The will of Mary McNally gave to her daughter Catherine Bell 'the upper tenement in house on lot No. 1, including lot, *conditioned upon said Catherine paying to my daughter Annie Whalan the sum of 400.*' Also to 'Frank McNally the lower tenement in above said house, forever, *conditioned upon said Frank paying to my son James E. and daughter Eliza the sum of (\$300.00 Cash) three hundred dollars.*' The two tenements in house on lot No. 2 were devised in similar terms, the lower to James E. and Eliza, including lot, and the upper to Bridget McNally. Then followed these two clauses: '*The above sums to be paid within three years from the time of my decease.* Also said James E. and Eliza are required to provide suitable provisions for

the sustenance of my son Philip during his life.' . . . The first question raised is whether the payment of the sums stated is a condition precedent or condition subsequent, or a charge upon the real estate devised. It is plain that the will does not create a condition precedent, because the devises are to take effect upon the death of the testatrix, while the payment is postponed for three years; nor a condition subsequent, because there is nothing in the will to show an intention of the testatrix to subject the estate to forfeiture. The payments were not for the benefit of her estate or of her heirs, generally, to whom a forfeiture would enure, but a mode of equalizing her gifts by requiring children to whom real estate was devised to make payments of money to other children who received no other gift from her. As there is no residuary clause in the will, it is evident that her property consisted only of this real estate, which could not be divided into as many parts as there were children; hence the equalization in payments of money. The use of the word 'conditioned' does not necessarily imply a strict condition, either precedent or subsequent. The intention must control. 2 Washb. Real Prop. 5th ed. 446, ¶ 3, and cases cited in note 5. We think that the intent in this case was to make the payments a charge upon the estate devised."

See also *Spangler v. Newman*, 239 Ill. 616, 88 N. E. 202; *Perry v. Hale*, 44 N. H. 363. In the latter case the facts were that the testator devised a life estate in his farm to his wife and then to his son "on condition that he pay testator's daughter Susan \$700, and his daughter Mary Ann \$800," and it was held that the bequests were a mere charge upon the farm.

We might cite many more authorities holding to the same effect, but we deem it unnecessary. We are entirely clear that by the will in question the testator did not intend that the devises to his sons should be upon any condition, either precedent or subsequent, but, rather, his intent was to vest in them at the date of their mother's death an unconditional estate, impressed, however, with a charge or trust in favor of the legatees aforesaid for the payment of such legacies. Not only the weight of authority, but we believe all authorities, support this conclusion.

In his supplemental brief respondent's counsel asserts that the foregoing authorities are not in point because of a distinction in the statutes

relating to perpetuities, but we are wholly at a loss to understand how these authorities can be differentiated from the case at bar on such ground. Surely, if the provisions of the will create a mere charge instead of a conditional devise, the statute against perpetuities and limiting the suspension of the power of alienation has no relevancy. The rule of construction which requires the testator's intention to be given effect is universally recognized, and no different rule is in force in common-law states than is in force in code states like North Dakota. Respondent's counsel seems to predicate his whole argument upon the assumption that the devises in question were upon a condition precedent, and, as we have seen, such assumption is unwarranted and without support in the authorities.

The judgment of the District Court is accordingly reversed and the cause remanded for further proceedings.

THE RED RIVER VALLEY BRICK CORPORATION et al. v.
THE CITY OF GRAND FORKS et al.

(146 N. W. 876.)

Civil contempt — order of trial court — appealable.

1. The facts in this case disclose a civil contempt, and an appeal lies to this court from an order of the trial court finding the defendants not guilty.

Evidence — contempt — good faith — no defense — sentence — clemency.

2. Evidence examined, and *held* to show the defendants guilty of contempt of court. *Held*, that it is the duty of the trial court to so hold, notwithstanding that the defendants acted in good faith and that no damage had resulted to plaintiff. If clemency in the premises should be shown, the proper place for its exercise is in the imposition of the sentence.

Punishment — discretion of court — fine — costs.

3. The punishment rests in the sound discretion of the trial court, under § 7562, Rev. Codes 1905, and the fine may be nominal. In addition to the fine, the plaintiff should be allowed to tax costs, including statutory attorney's fees.

Opinion filed March 6, 1914. Rehearing denied April 13, 1914.

Appeal from the District Court of Grand Forks County, *Kneeshaw*, Judge.

Reversed in part, and in part affirmed.

Geo. A. Bangs, and *Geo. R. Robbins*, for appellants.

Under the act in question the city stands in no representative capacity toward the owners or residents of the annexed tract of land; the rights of such owners and residents are not consulted, and they have no voice in the proceedings to annex their territory to the city. The act is invalid. *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Morton v. Holes*, 17 N. D. 158, 115 N. W. 256; *People ex rel. Atty. Gen. v. Holihan*, 29 Mich. 116; *State ex rel. Bolt v. Riordan*, 73 Mich. 508, 41 N. W. 482; *State ex rel. Williams v. Sawyer County*, 140 Wis. 634, 123 N. W. 248; *Glaspell v. Jamestown*, 11 N. D. 89, 88 N. W. 1023; *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 719; *Peru v. Bearss*, 55 Ind. 576.

The order dismissing the order to show cause is a final order and is appealable. *Merchant v. Pielke*, 9 N. D. 245, 83 N. W. 18; *Ballston Spa Bank v. Marine Bank*, 18 Wis. 491; *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 13 L.R.A.(N.S.) 591, 112 N. W. 1095; *Rev. Codes 1905*, § 5626 (7225).

The merits of the original litigation cannot be here involved. 9 Cyc. 11; 7 Am. & Eng. Enc. Law, 56; 2 High, Inj. 4th ed. §§ 1416, et seq.; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *People v. Spalding*, 2 Paige, 330; *Erie R. Co. v. Ramsey*, 45 N. Y. 644; *Clark v. Bininger*, 75 N. Y. 344; *Cline v. Whittaker*, 144 Wis. 439, 129 N. W. 400.

Courts possess inherent power to punish for contempt. 9 Cyc. 26; 7 Am. & Eng. Enc. Law, 2d ed. 33; *State ex rel. Crow v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 88; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 964; *Re Hanson*, 80 Kan. 784, 105 Pac. 694; *Drady v. District Ct.* 126 Iowa, 345, 102 N. W. 117; *Rucker v. State*, 170 Ind. 638, 85 N. W. 356; *Mahoney v. State*, 33 Ind. App. 658, 104 Am. St. Rep. 276, 72 N. E. 151.

The injunction is not vacated by appeal. 2 High, Inj. §§ 1698-1702, pp. 1647, 1648; 2 Cyc. 913; 22 Cyc. 1011; 7 Am. & Eng. Enc. Law, 2d ed. 55; 16 Am. & Eng. Enc. Law, 2d ed. 436; 20 Enc. Pl. & Pr. 1231; 2 Spelling, New Tr. & App. Pr. § 561; *State ex rel. Matthews*

v. Chase, 41 Ind. 356; Walls v. Palmer, 64 Ind. 493; Central U. Teleph. Co. v. State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Hawkins v. State, 126 Ind. 294, 26 N. E. 43; 6th Ave. R. Co. v. Gilbert Elev. R. Co. 71 N. Y. 430; Genet v. Delaware & H. Canal Co. 113 N. Y. 472, 21 N. E. 390; Lindsay v. Clayton Dist. Ct. 75 Iowa, 509, 39 N. W. 817; Lindsay v. Hatch, 85 Iowa, 332, 52 N. W. 226; Cole v. Edwards, 104 Iowa, 373, 73 N. W. 863; Whitlock v. Wade, 117 Iowa, 153, 90 N. W. 587; Young v. Rothrock, 121 Iowa, 588, 96 N. W. 1105; Slaughter-house Cases, 10 Wall. 273, 19 L. ed. 915; Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136; Leonard v. Ozark Land Co. 115 U. S. 465, 29 L. ed. 445, 6 Sup. Ct. Rep. 127; Knox County v. Harshman, 132 U. S. 14, 33 L. ed. 249, 10 Sup. Ct. Rep. 8; Merrimack River Sav. Bank v. Clay Center, 219 U. S. 527, 55 L. ed. 320, 31 Sup. Ct. Rep. 295, Ann. Cas. 1912A, 513; Green Bay & M. Canal Co. v. Morris, 63 C. C. A. 433, 128 Fed. 897; New England R. Co. v. Hyde, 41 C. C. A. 404, 101 Fed. 400; Merced Min. Co. v. Fremont, 7 Cal. 130, 7 Mor. Min. Rep. 309; Heinlen v. Cross, 63 Cal. 44; Swift v. Shepard, 64 Cal. 423, 1 Pac. 493; Dewey v. Superior Ct. 81 Cal. 68, 22 Pac. 333; Stewart v. Superior Ct. 100 Cal. 543, 35 Pac. 156, 563; Schwartz v. Superior Ct. 111 Cal. 106, 43 Pac. 580; Foster v. Superior Ct. 115 Cal. 279, 47 Pac. 58; Rogers v. Superior Ct. 126 Cal. 183, 58 Pac. 452; Clute v. Superior Ct. 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362; Barnes v. Chicago Typographical Union, 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932; Bullion B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 151, 13 Pac. 174, 15 Mor. Min. Rep. 449; Ex parte Whitmore, 9 Utah, 441, 35 Pac. 524; State ex rel. Busch v. Dillon, 96 Mo. 56, 8 S. W. 781; C. H. Albers Commission Co. v. Spencer, 236 Mo. 608, 139 S. W. 325, Ann. Cas. 1912D, 705; State v. Barnett, 111 Mo. App. 552, 86 S. W. 460; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 9 L.R.A.(N.S.) 1225, 56 S. E. 257; State ex rel. Bettman v. Harness, 42 W. Va. 414, 26 S. E. 270; Wilkinson v. Dunkley-Williams Co. 141 Mich. 409, 104 N. W. 772, 7 Ann. Cas. 40; Kentucky & I. Bridge Co. v. Krieger, 91 Ky. 625, 16 S. W. 824; Maloney v. King, 26 Mont. 487, 68 Pac. 1012; State ex rel. Commercial Electric Light & P. Co. v. Stallcup, 15 Wash. 263, 46 Pac. 251; State ex rel. Flaherty v. Superior Ct. 35 Wash. 200, 77 Pac.

33; *State ex rel. Burrows v. Superior Ct.* 43 Wash. 225, 86 Pac. 632; *State ex rel. Gibson v. Superior Ct.* 39 Wash. 115, 1 L.R.A.(N.S.) 554, 109 Am. St. Rep. 862, 80 Pac. 1108, 4 Ann. Cas. 229; *Ft. Worth Fair Asso. v. Ft. Worth Driving Club*, 56 Tex. Civ. App. 167, 121 S. W. 213; *Lytle v. Galveston, H. & S. A. R. Co.* 41 Tex. Civ. App. 112, 90 S. W. 316; *Union Sawmill Co. v. Felsenthal Land & Townsite Co.* 84 Ark. 494, 106 S. W. 676; *Sheridan v. Reese*, 121 La. 226, 46 So. 218.

The advice of counsel is no defense. 2 Cyc. 915; 9 Cyc. 25; 22 Cyc. 1013; *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895; *Wilcox Silver Plate Co. v. Schimmel*, 59 Mich. 524, 26 N. W. 692; *Lansing v. Easton*, 7 Paige, 364; *Hessey v. Gund*, 98 Wis. 531, 74 N. W. 342; *State ex rel. Mann v. Brophy*, 38 Wis. 427; *Continental Nat. Bldg. & L. Asso. v. Scott*, 41 Fla. 421, 26 So. 726; *State ex rel. Mason v. Harper's Ferry Bridge Co.* 16 W. Va. 864.

The injunction binds all persons, although not parties to the action, who have actual knowledge of it. *Garrigan v. United States*, 23 L.R.A. (N.S.) 1295, 89 C. C. A. 494, 163 Fed. 16; *Ex parte Teslard*, 102 Tex. 287, 115 S. W. 1155, 20 Ann. Cas. 117; *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 106 Am. St. Rep. 562, 74 N. E. 431, 3 Ann. Cas. 28; *Ex parte Lennon*, 12 C. C. A. 134, 22 U. S. App. 561, 64 Fed. 323; 22 Cyc. 1011; 22 Cyc. 1013; *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895; 9 Cyc. 59; *State ex rel. Hoefs v. District Ct.* 113 Minn. 304, 129 N. W. 583; *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585; *Ashby v. Ashby*, 62 N. J. Eq. 618, 50 Atl. 473; *Clay v. Watters*, 101 C. C. A. 645, 178 Fed. 385, 21 Ann. Cas. 897.

Attorney's and counsel fees are included as costs and expenses, and may be imposed upon the persons sued. *My Laundry Co. v. Schmeling*, 129 Wis. 621, 109 N. W. 540; *State ex rel. Hoefs v. District Ct.* 113 Minn. 304, 129 N. W. 583; *Davidson v. Munsey*, 29 Utah, 181, 80 Pac. 743; *People ex rel. Garbutt v. Rochester & State Line R. Co.* 76 N. Y. 301; *Brett v. Brett*, 33 Hun, 547; *State ex rel. Curtis v. Durein*, 46 Kan. 695, 27 Pac. 148; 9 Cyc. 55; 4 Enc. Pl. & Pr. 807; *Taylor v. Chicago, M. & St. P. R. Co.* 83 Wis. 645, 53 N. W. 855; *Emerson v. Huss*, 127 Wis. 215, 106 N. W. 518; *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 592, 13 L.R.A.(N.S.) 591, 112 N. W. 1095; *Fall Brook Coal Co. v. Hecksher*, 42 Hun, 534; *People v. Spalding*, 2

Paige, 330; Lansing v. Easton, 7 Paige, 364; Moffat v. Herman, 116 N. Y. 131, 22 N. E. 287; Socialistic Co-op. Pub. Asso. v. Kuhn, 164 N. Y. 473, 58 N. E. 649.

J. B. Wineman, for respondents.

The alleged contempt is more in the nature of a criminal contempt than civil, and if so, no appeal lies. Phillips v. Welch, 11 Nev. 187; Rapalje, Contempt, § 21; 7 Am. & Eng. Enc. Law, 2d ed. 2829; Gompers v. Buck's Stove & Range Co. 221 U. S. 441, 55 L. ed. 805, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492.

This court will refuse, in such cases, to try any case anew that does not fall within the provisions of § 5630, Rev. Codes 1905. Noble Twp. v. Aasen, 10 N. D. 268, 86 N. W. 742; Zimmerman v. State, 46 Neb. 13, 64 N. W. 375; Craig v. McCulloch, 20 W. Va. 148; Rev. Codes 1905, § 7218.

The respondents obeyed the injunctive order in every particular, until after perfecting their appeal to the supreme court, and the execution of the judgment stayed. 18 Am. & Eng. Enc. Law, 299; Ætna Ins. Co. v. Kittles, 81 Ind. 97; Territory ex rel. Wallace v. Woodbury, 1 N. D. 85, 44 N. W. 1077; Carruth v. Taylor, 8 N. D. 172, 77 N. W. 617; Northwestern Mut. L. Ins. Co. v. Park Hotel Co. 37 Wis. 125; Hudson v. Smith, 9 Wis. 122; Schwarz v. Superior Ct. 111 Cal. 106, 43 Pac. 580; Stewart v. Superior Ct. 100 Cal. 543, 35 Pac. 156; Holmes v. Mattoon, 111 Ill. 27, 53 Am. Rep. 602; Foster v. Superior Ct. 115 Cal. 279, 47 Pac. 58; 9 Cyc. 12; Riley Bros. Co. v. Melia, 3 Neb. (Unof.) 666, 92 N. W. 913; State v. Johnson, 13 Fla. 33; Osborne v. Williams, 40 N. J. Eq. 490, 4 Atl. 439; Northern C. R. Co. v. Canton Co. 24 Md. 500; Gelston v. Sigmund, 27 Md. 345; State ex rel. Gibson v. Superior Ct. 1 L.R.A.(N.S.) 555, note; Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567.

An appeal of any kind, when perfected, deprives the court from which the appeal is taken of power or jurisdiction to enter further orders or process. Elliott, App. Proc. 541; Harris v. People, 66 Ill. App. 306; Heyman v. Heyman, 117 Ill. App. 545; Ex parte Thatcher, 7 Ill. 167; Ambrose v. Weed, 11 Ill. 488; Jenkins v. Jenkins, 91 Ill. 167; People ex rel. Frank v. Prendergast, 117 Ill. 588, 6 N. E. 695; Smith v. Chytraus, 152 Ill. 664, 38 N. E. 911; Elzas v. Elzas, 183 Ill. 160, 55 N. E. 669; Cowan v. Curran, 216 Ill. 622, 75 N. E. 322;

Continental Invest. & L. Soc. v. McKay, 69 Ill. App. 72; Anderson v. Anderson, 124 Ill. App. 621; Harris v. People, 66 Ill. App. 310; Pennsylvania R. Co. v. National Docks & N. M. Junction Connecting R. Co. 54 N. J. Eq. 647, 35 Atl. 433; Howe v. Searing, 6 Bos-w. 686; Ireland v. Nichols, 9 Abb. Pr. N. S. 72; Ex parte Orford, 102 Cal. 656, 36 Pac. 928; Ruggles v. Superior Ct. 103 Cal. 125, 37 Pac. 211; Catlin v. Baldwin, 47 Conn. 173; State, Hunt, Prosecutor, v. Lambertville, 46 N. J. L. 59; McQuade v. Emmons, 38 N. J. L. 397; Patchin v. Brooklyn, 13 Wend. 664; M'Laughlin v. Janney, 6 Gratt. 609; Bristow v. Home Bldg. Co. 91 Va. 18, 20 S. E. 946, 947; Kentucky & I. Bridge Co. v. Krieger, 91 Ky. 625, 16 S. W. 824; Smith v. Western U. Teleg. Co. 83 Ky. 269; Yocum v. Moore, 4 Bibb, 221; Hamilton v. State, 32 Md. 348; Barnes v. Chicago Typographical Union, 14 L.R.A.(N.S.) 1151, note; Gelston v. Sigmund, 27 Md. 345.

The trial courts of this state are vested with discretion in contempt proceedings. Brown v. Brown, 96 Ky. 505, 29 S. W. 319; Howard v. Durand, 36 Ga. 346, 91 Am. Dec. 767; People ex rel. New York Soc. v. Gilmore, 88 N. Y. 626; Murray v. Berry, 113 N. C. 46, 18 S. E. 79; Re Consolidated Rendering Co. 80 Vt. 55, 66 Atl. 790, 11 Ann. Cas. 1071; Eaton Rapids v. Horner, 126 Mich. 52, 85 N. W. 265; New York v. New York & S. I. Ferry Co. 64 N. Y. 622; Moon Bros. Carriage Co. v. Waxahachie Grain & Implement Co. 13 Tex. Civ. App. 103, 35 S. W. 337; Coursen v. Dearborn, 7 Robt. 143; Scott v. Layng, 59 Mich. 43, 26 N. W. 220, 791; Ex parte Woodruff, 4 Ark. 630; Re Contempt by Four Clerks, 111 Ga. 89, 36 S. E. 237; Darby v. Wesleyan Female College, 72 Ga. 212; Lightfoot v. Freeman, 54 Ga. 215; Heard v. Callaway, 51 Ga. 314; Dinet v. People, 73 Ill. 183; Kahlbon v. People, 101 Ill. App. 567; Hughson v. People, 91 Ill. App. 396; Allen v. State, 131 Ind. 599, 30 N. E. 1093; Fishback v. State, 131 Ind. 304, 30 N. E. 1088; Burke v. State, 47 Ind. 528; Re Woolley, 11 Bush, 95; Re Chadwick, 109 Mich. 588, 67 N. W. 1071; Mackay v. State, 60 Neb. 143, 82 N. W. 372; Rosewater v. State, 47 Neb. 630, 66 N. W. 640; Percival v. State, 45 Neb. 741, 50 Am. St. Rep. 568, 64 N. W. 221; Watertown Paper Co. v. Place, 51 App. Div. 633, 64 N. Y. Supp. 673; Re Wegman, 40 App. Div. 632, 57 N. Y. Supp. 987; Bergh's Case, 16 Abb. Pr. N. S. 266; Weeks v. Smith, 3 Abb. Pr. 211; Re Fitton, 16 How. Pr. 303; Jackson v. Smith, 5

Johns. 115; Kron v. Smith, 96 N. C. 386, 2 S. E. 463; Re Walker, 82 N. C. 95; Ex parte Biggs, 64 N. C. 202; Re Moore, 63 N. C. 397; St. Clair v. Piatt, Wright (Ohio) 532; State v. Coulter, Wright (Ohio) 421; Thomas v. Cummins, 1 Yeates, 40; Wells v. Com. 21 Gratt. 500; United States v. Church of Jesus Christ, 6 Utah, 9, 21 Pac. 503, 524, 8 Am. Crim. Rep. 138; Re Perkins, 100 Fed. 950; Vose v. Internal Improvement Fund, 2 Woods, 647, Fed. Cas. No. 17,008.

If respondents are guilty of the acts charged, it is beyond their power to undo such acts, and consequently the only object of punishment would be to vindicate the dignity of the court; and such being the case, the court ought to be the sole judge as to whether or not its dignity has been vindicated. 9 Cyc. 52; Cartwright's Case, 114 Mass. 230; Stimpson v. Putnam, 41 Vt. 238; Re Chiles (Texas v. White) 22 Wall. 157, 22 L. ed. 819; Re Perkins, 100 Fed. 950.

The question of costs is not properly before this court; it was not before or considered by the trial court. O'Rourke v. Cleveland, 49 N. J. Eq. 577, 31 Am. St. Rep. 719, 25 Atl. 367.

BURKE, J. During the year 1911 the city of Grand Forks, acting through its city council and under the provisions of article 20, Political Code, Rev. Codes 1905, attempted to annex certain territory contiguous to said city, which territory included about ten acres of land belonging to this plaintiff. On the 11th of March, 1912, an action was instituted to determine the validity of the proceedings, and upon the trial below it was determined that all of said proceedings were void, and the defendant city and its officers were perpetually enjoined from proceeding with the said annexation. This injunction was dated the 6th day of May, 1912, and on the 22d of the same month defendant perfected an appeal to this court, a bond being expressly waived. On the 25th of May, 1912, plaintiff filed an affidavit alleging that the defendants were violating the injunction order by proceeding with the levy of the city tax upon the said territory, and again on the 7th of June another affidavit was filed alleging that the city of Grand Forks, its assessor, mayor, auditor, and city attorney, had violated the injunction order of the court, and an order was asked requiring them to show why they should not be punished for contempt. This order was issued and served upon all of the defendants excepting the mayor, who was absent from the

state. Upon the return day the defendants appeared specially, and objected to the jurisdiction of the court, and filed answers denying that they had acted wilfully and contumaciously, particularly disclaiming any intention of being disrespectful to the court, and alleging that they had been actuated alone by a desire to perform their duties as officials of the city of Grand Forks, and to protect the interests of the public by complying with the provisions of the statute relative to the assessment of property. Interrogatories were prepared, and in answer thereto the said officials admitted that they had proceeded with the assessment of plaintiff's premises, but had done so upon the advice of the city attorney, and upon the belief that the appeal to the supreme court had superseded the effects of the injunction. The case was tried before the trial court, who found that the defendants were not guilty of any intentional contempt as charged, and dismissed the proceedings. This appeal is from such finding and order.

The defendants appealed the original case, involving the validity of the annexation proceedings, to this court, as before mentioned, and the judgment was affirmed. See *Red River Valley Brick Co. v. Grand Forks*, ante, 8, 145 N. W. 725.

(1) The first point arising is whether or not an appeal will lie from this order. Respondent takes the ground that this is a criminal contempt, and the finding of the trial court amounts to an acquittal of the charge, but we do not think this view can be sustained. In *Enoch Morgan's Sons Co. v. Gibson*, 122 Fed. 420, it is said: "Contempts of court are of two kinds: Those that are prosecuted to punish persons for showing disrespect to the courts, either by offensive conduct in their presence or by setting their authority at defiance, in the prosecution of which the entire public is immediately interested because the welfare of the courts is concerned; and those contempt proceedings that are inaugurated at the instance of some private litigant or litigants to compel obedience to an order or decree made in the case for the protection of their individual rights. In the latter class of cases the public at large is not directly interested. The proceeding does not partake of the character of a public prosecution at the instance of the state, as for a crime committed in setting the authority of its courts at defiance, but the proceeding is rather of a civil or remedial nature, for the benefit of a particular individual or individuals whose rights cannot be other-

wise preserved." It is apparent that the contempt proceedings under consideration belong to the civil class, and, under the ruling in the case of *Merchant v. Pielke*, 9 N. D. 245, 83 N. W. 18, the order is an appealable one.

(2) The next question for consideration is whether or not the finding of the trial court to the effect that the defendants were not guilty is sustained by the evidence. It is conceded that the city of Grand Forks itself, the mayor and the city auditor, did nothing in violation of the injunction order, and as to them the judgment of the trial court is correct and should be affirmed; but as to the assessor and the city attorney a different state of facts exist. The following interrogatory was propounded to the assessor: Q. "Did you obey, and have you since May 25, 1912, obeyed, the commands, requirements therein (in said judgment) contained?" A. "No." And the city attorney was asked the following interrogatory: Q. "Have you obeyed the commands, requirements, and injunctions in said judgment contained?" A. "I have not." And the other interrogatories and proceedings fully bear out the conclusions announced by those two defendants. While it is conceded that the assessor and city attorney have acted in perfect good faith and in the belief that the appeal had superseded the provision of the injunction, and that they were conserving the interests of the city, and that no harm could or would come to the plaintiffs by reason of their acts, still we think their conduct at least a technical guilt, and the trial court should have so found. In the case of *Enoch Morgan's Sons Co. v. Gibson*, *supra*, it is said: "Moreover, if that right has been invaded by the appellee, notwithstanding the decree, the court which entered the decree could with no greater propriety refuse relief when the fact was called to its attention by the appellant than it could withhold an execution to collect a judgment which it had rendered." In *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 13 L.R.A.(N.S.) 591, 112 N. W. 1095, it is said: "The order in question may have been too broad, but it was within the jurisdiction of the commissioner, and if erroneous, the remedy was by motion to modify its terms, not by disregarding them. The orders of a court having jurisdiction must be obeyed. If they can with impunity be disregarded, they should never be made. A court which makes such orders can give no good reason for its existence. It should be abolished. It is not a court in any true sense of

the term." See also *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.* 55 Wash. 1, 103 Pac. 426, 107 Pac. 196.

The evidence conclusively establishes the fact that the defendants were guilty of contempt, and the fact that they were acting in good faith, and that no damage had come to the plaintiffs, could in no manner alter the ultimate fact of their guilt. Provision is made for clemency on account of those extenuating circumstances. Sec. 7562, Rev. Codes 1905, provides that when no actual injury or loss has been produced, the fine shall not exceed \$250 over and above the costs and expenses of the proceeding. This leaves the question of extenuating circumstances to be considered by the court after the defendant has been adjudged guilty, and the question of clemency should not be extended to an acquittal upon the charge. The finding of the trial court as to those two defendants is erroneous, and must be reversed.

(3) The question of punishment lies in the sound discretion of the trial court. If that court desires to extend leniency, the fine may be a mere nominal one. This fine must be in addition to the costs and expenses of the proceedings, which will be taxed by the clerk of court the same as any other civil action. The attorneys' fees included in this taxation will be statutory, and not those actually incurred. Of course, the statutory cost will not fully reimburse appellant, but this objection can be made to every lawsuit. As no damages had been incurred at the time of the institution of the proceedings, nothing need be allowed upon this score.

The judgment of the trial court is reversed in the particulars named, and affirmed otherwise. Appellant will recover costs on this appeal.

THE RED RIVER VALLEY BRICK CORPORATION et al. v.
THE CITY OF GRAND FORKS et al.

(146 N. W. 878.)

Opinion filed March 6, 1914. Rehearing denied April 13, 1914.

Appeal from the District Court of Grank Forks County, *Kneeshaw*, Judge.

George A. Bangs and George R. Robbins, of Grand Forks, N. D., for appellants.

J. B. Wineman, of Grand Forks, N. D., for respondents.

PER CURIAM. The facts in this case are almost identical with those in the case of the same title just decided by this court, and the decision in that case is also adopted in this.

OLE TROMSDAHL v. Theodore Nass, Maria Nass, and Duncan Beaton, DUNCAN BEATON (alone, appellant).

(146 N. W. 719.)

State homestead — claimant — head of family — residence upon — temporary absence — domicil — exemption of homestead — intent alone insufficient — must be accompanied by acts — mortgage of plaintiff valid.

Action involves validity of a mortgage given by mortgagor, a married man, without his wife joining therein, and under the following facts: Mortgagor came here from Sweden in 1906, leaving his wife and six children there. In 1907 he made homestead entry on land in Williams county, upon which he established residence, and later offered final proof, on June 8, 1908, the date on which he executed the mortgage in question. Receiver's receipt was issued October 23d following, with delivery of patent thereon in June, 1909. This mortgage was recorded in October, 1908. Two years later, in November, 1910, another mortgage was given to appellant, Duncan Beaton, which was also recorded. If the first mortgage be invalid the Beaton mortgage is a first and only mortgage; otherwise it is subject to plaintiff's mortgage. Each mortgage is for nearly as much as the land is worth. The entryman, mortgagor, testifies that he took the homestead as a home for himself and family, with the intention of at some time, and as soon as he secured sufficient money to do so, to have his wife and family brought here from Sweden. He has always been dependent upon labor, and has sent more than \$300 to his family in Sweden for their support, sending the same in small amounts at regular intervals. He is fifty-

Note.—The authorities on the question as to what constitutes a "family" under the homestead and exemption laws are collated in a note in 4 L.R.A.(N.S.) 365. See also notes in 61 Am. Dec. 586, and 70 Am. St. Rep. 107. And as to whether continuance of family is a condition of the continuance of homestead, where its existence is a condition of the inception of the homestead, see note in 16 L.R.A.(N.S.) 111.

four years old, his wife fifty-five. He has never taken out final citizenship papers, having made final proof based on his declaration of intention to become a citizen. The usual homesteader's shack constituted the bulk of his improvements on the land, which he left in June, 1908, returning to Bottineau county, 200 miles distant, where he resided for four years, to the date of trial, in 1912. If the land was a state homestead, that is, was impressed with the characteristics of a home as guaranteed exempt by § 208 of the state Constitution, and § 5049, Rev. Codes 1905, to "every head of a family residing in this state, . . . and consisting of a dwelling house in which the homestead claimant resides," the mortgage of plaintiff is void, otherwise it is valid. *Held:*

The tract never became a state homestead as defined in §§ 5049, 5050, as available to a claimant or to the head of a family as defined by § 5070, Rev. Codes 1905, for the want of a resident family residing upon the tract. To possess a homestead exemption there must be a resident family, and a family residence wherein the homestead claimant resides. Residence within this state and upon the tract is required of both the head of the family and the family. This is not a case of temporary absence of the family from the state or homestead, nor has the family ever constructively acquired a domicile or a residence in this country under these facts. The exemption to homestead claimants was designed to protect those who subject themselves to the laws of our state and act in reliance thereon, but not to treat as homes what are not homes in fact, nor give powers to nonresidents, which could not under any circumstances be of use to them personally. Where the future removal of the family of the homestead claimant into this state of his residence is wholly uncertain, and a period of six years elapses without their removal from the foreign country to this state, no homestead exemption will be accorded to the husband. Intent alone to bring the family, unaccompanied by their removal from the foreign country within a reasonable time, is insufficient to bring the claimant within either the letter or the spirit of the state homestead statute. The mortgage is held to be valid.

Opinion filed March 14, 1914. Rehearing denied April 13, 1914.

Appeal from the district court of Williams county, *Frank Fisk, J.*
Affirmed.

Henry G. Middaugh and *Rollo T. Hunt*, for appellant.

The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto. Rev. Codes 1905, § 4076.

A conveyance of the homestead must be executed by both husband and wife. Rev. Codes 1905, § 5052.

A mortgage on the homestead, executed by the husband alone, is not voidable, but wholly void. *Gaar, S. & Co. v. Collin*, 15 N. D. 622,

110 N. W. 81; *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245; *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; Rev. Codes 1905, § 6686.

The homestead is preserved and protected, not for the head of the family, but for the family. *Bremseth v. Olson*, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155; *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684.

No declaration of homestead is necessary. *Rosholt v. Mehus*, 3 N. D. 513, 23 L.R.A. 239, 57 N. W. 783; *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185.

Temporary absence therefrom does not defeat the homestead. *Smith v. Spafford*, 16 N. D. 208, 112 N. W. 965; *Edmonson v. White*, 8 N. D. 74, 76 N. W. 986; *Gaar, S. & Co. v. Collin*, 15 N. D. 622, 110 N. W. 81; *Gee v. Moore*, 14 Cal. 472.

A conveyance of the homestead, not executed by the husband and wife, is void. *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245; *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; *Justice v. Souder*, 19 N. D. 613, 125 N. W. 1029.

Bowen & Adams, for respondent.

The mere intention to occupy certain premises as the homestead is insufficient, in the absence of some acts indicative of carrying such intention into immediate effect, to some extent at least. Rev. Codes 1905, § 5054; *Styles v. Theo. P. Scotland & Co.* 22 N. D. 469, 134 N. W. 708; *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84; *Justice v. Souder*, 19 N. D. 613, 125 N. W. 1029.

Actual possession, when applied to land, is the actual and continuous occupancy or exercise or full dominion. *M'Colman v. Wilkes*, 3 Strobh. L. 465, 51 Am. Dec. 637; 31 Cyc. 926 (c), 927 (2) and cases cited; *Binda v. Benbow*, 9 Rich. L. 15.

Goss, J. Plaintiff brings this action to foreclosure a real-estate mortgage upon land in Williams county, owned by the original homesteader, Theodore Nass, who admittedly executed and delivered his promissory notes for \$1,070 and interest, secured by real-estate mortgage, signed by himself alone, to this plaintiff, his brother. This mortgage was recorded two years before that of defendant and sole appellant, Duncan Beaton, who has defended for himself alone, and asked foreclosure of

his \$800 mortgage, taken and recorded subsequent to plaintiff's mortgage, which first mortgage he desires to have declared invalid because Marie, wife of Theodore Nass, did not join in or sign the mortgage to plaintiff, as required by § 5052, Rev. Codes 1905, if the tract was impressed with the character of a state homestead under §§ 5049-5070, Rev. Codes 1905. Briefly summarized, the issue is not one of priority between mortgages, but, instead, whether the first mortgage, belonging to plaintiff, is valid, the mortgagor's wife not having joined therein.

There is no dispute in the material facts. Mortgagor, Theodore Nass, married his wife, Marie Nass, in Sweden in 1896, where they lived and where six children were born to them. In July, 1906, he came to the United States, leaving his family in Sweden. In April, 1907, he made homestead entry on this land. Within the six months' period allowed for establishing residence on government homesteads he established his residence on the tract, and maintained it for the requisite eight months, when he made final proof. At the time of final proof, before United States Commissioner Flittie, at Williston, on the 8th of June, 1908, he executed and delivered the mortgage and notes in question to his brother, this plaintiff. His proof was subsequently accepted, and a receiver's receipt thereon issued October 23, 1908, followed by patent dated June 17, 1909. Plaintiff's mortgage was recorded October 24, 1908. Two years thereafter, or on the 22d of November, 1910, the mortgage of \$800 was executed to Duncan Beaton, and was recorded the 11th of January, 1911.

Nass has testified that he took the homestead as a home for himself and family, and with the intention at some time, as soon as he acquired the means to do so, to send to Sweden and have his wife and family brought over. He has been obliged to depend upon labor for his sustenance, and during the period from his arrival to the time of trial he has earned and sent upwards of \$300 to his family in Sweden. This has been sent in small amounts, at regular intervals, and is proof on his part of his good faith toward his family. One child, a girl, has been brought to this country, and at the time of trial was residing at Rugby, neither the time of her arrival nor her age being shown. It does not appear that she ever resided with him upon the homestead, or that she was in this country at the time of the execution of the mortgage to plaintiff. From the care with which the case was tried we shall

assume that she was not then in this country or residing with mortgagor on this land; otherwise proof of the facts would have been made. His wife is fifty-five years old, and plaintiff fifty-four. The homesteader in an alien, never having taken out final citizenship papers, having tendered final proof on his declaration of intention to become a citizen, as the homestead law permits may be done on fourteen months' proof, where the land is purchased for the \$200 fee per quarter section paid the government. The land is not worth the total of both mortgages, the proof showing the value thereof to be about \$1,500. The usual homesteader's shack constituted the bulk of the improvements at the time of proof. Soon after proof was made, in June, 1908, Nass left his homestead and returned to Bottineau county, 200 miles distant, where he has at all times since resided, and where he was residing at the date of trial, on July 12, 1912. Practically all of the testimony offered by defendant Beaton was taken under objection, for which basis is laid in plaintiff's pleadings, to the effect that as no declaration of homestead in the real property mortgaged has ever been filed by anyone, and that more than two years has elapsed after the execution of the instrument sought to be foreclosed and the commencement of these proceedings, in time nearly four years, no defense based upon homestead rights can be asserted as against the mortgage. Plaintiff seeks to avail of §§ 5053, 5054, Rev. Codes 1905, and as against such claim the defendant claims to have been in actual possession of the land when mortgaged, and has not since quit possession thereof up to the time of the interposition of his defense in this action.

Any rights of Nass or defendant Beaton must be founded upon the assumption that the proof establishes that Nass is entitled to claim the homestead exemption, as a homestead is defined by § 5049, Rev. Codes 1905. For either of the defendants to avail of homestead rights the facts must bring Nass within this statutory exemption. The statute defines a homestead as follows: The homestead of every "head of a family residing in this state," of a prescribed area, "and consisting of a dwelling house in which the homestead claimant resides, and all of its appurtenances," shall be exempt from forced sale as provided by law. The question first arising under the proof is whether Nass, a married alien with a family whom he is supporting, at all times resident in Sweden, can claim a right of homestead, under § 5049, in land concern-

ing which, had his family been here and resident with him upon the land, he and his family, beyond question, would have possessed homestead rights. The homestead exemption is not given to every married man or woman or person having others dependent upon him for support. "The homestead exemption is intended solely for the benefit of the family, and none are authorized in law to participate in its advantages except those who come within the meaning of that term" family. *Prater v. Prater*, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623-628, and note. It is not given to the resident in this state who possesses a family abroad, but, instead, to every "head of a family residing in this state," in "a dwelling house in which the homestead claimant resides;" or, as held in *Calmer v. Calmer*, 15 N. D. 120-125, 106 N. W. 684, it "means the real property in or upon which the home is located, and which is devoted to a use appropriate and usual to a home place." The portion of the statute requiring residence in this state has reference to the residence of the family as much as to the residence of the head of the family, in instances, as here, where the family is actually resident abroad, and cannot be considered as constructively resident at the husband's domicile. And the reason for this is apparent, and is conclusive against defendant's contention. The homestead privilege "can only be reserved to a family. Homesteads are most frequently secured to the head of a family. What constitutes the relationship will vary according to circumstances," governed by § 5070, Rev. Codes 1905, defining "head of a family." But to possess the exemption there must be a resident family, and a family residence wherein the "homestead claimant resides." Rev. Codes 1905, § 5049; *Smith v. Spafford*, 16 N. D. 208, 112 N. W. 965; 21 Cyc. 466 *et seq.* and cases cited. It is doubtful if there is any valid reason why a married man in plaintiff's situation, who may never bring his family to this country (not having done so for six years since his arrival, and he being here, as the proof discloses, because he can secure more wages than in Sweden, and who elects to remain an alien, not giving this country even citizenship in return for its gold) should enjoy a homestead privilege as the resident head of a resident North Dakota family, an exemption, privilege, or right denied to even the native and resident single men and women under ordinary circumstances. Certain it is that this court has denied the homestead exemption where more reason for granting it

existed than here. See *Holcomb v. Holcomb*, 18 N. D. 561, 120 N. W. 547, 21 Ann. Cas. 1145, where it was denied to a former wife who had secured a divorce and custody of children of the marriage, the husband contributing to the support of the family by alimony paid under award, the husband dying and the family being denied exemptions in his estate. Homestead provisions should be construed with reasonable liberality to effect their purposes (*Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684; *Bremseth v. Olson*, 16 N. D. 242, 13 L.R.A. (N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155), but it is a joke to contend that the framers of the homestead statutes ever contemplated that they should be invoked under such circumstances as these. This is not a case of abandonment of homestead rights (as *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185, and *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245); nor a question of who is head of a family (*Ness v. Jones*, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706); nor mere absence of a wife from an established family homestead (as in *Rosholt v. Mehus*, 3 N. D. 513, 23 L.R.A. 239, 57 N. W. 783); nor want of a proper habitation jeopardizing the homestead right (*Edmonson v. White*, 8 N. D. 72, 76 N. W. 986); nor of in what member of the resident family upon the land title to the land was vested (as *Bremseth v. Olson*, *supra*), nor its being given for the benefit of the whole family and each member thereof (*Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684); nor of abandonment of a homestead by a husband with nonresident wife (as in *Blatchley v. Dakota Land & Cattle Co.* 26 N. D. 532, 145 N. W. 95); but is a case where no homestead exemption ever attached, nor, under the evidence as to acts as well as intent, could ever be claimed. No court has held the contrary that we have been able to find when the decisions are carefully read. For a case closely parallel in facts to this, supporting our holding, see *Koons v. Rittenhouse*, 28 Kan. 359, under statutes analogous to §§ 5049 and 5052, Rev. Codes 1905; also *Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821, 31 N. W. 395, that "it [the state's guarantee of the right of homestead] was designed to protect those who had subjected themselves to its laws, and acted in reliance on them, but not to treat as homes what are not homes, or give powers to nonresidents which could not under any circumstances be of any use to them personally." If the wife in Sweden were to come here, and attempt to claim her

homestead rights and that the deed is void because not joined in by her, the facts would be parallel to the Michigan case, where the wife was always a resident of New York, while the husband resided in Michigan. This case is followed in *Black v. Singley*, 91 Mich. 50, 51 N. W. 704, where, as here, there was testimony that the husband "when he got ready and the means was going to fetch his family" from Pennsylvania, but never did so. Held, no homestead rights were acquired by the wife. "If the future removal of his family into the state of his residence is wholly uncertain," no homestead privilege or exemption arises. 21 Cyc. 470, citing *Dobson v. Shoup*, 3 Kan. App. 468, 43 Pac. 817. See also *Edgerton v. Connelly*, 3 Kan. App. 618, 44 Pac. 22; *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493; *Meyer v. Claus*, 15 Tex. 516; *Allen v. Manasse*, 4 Ala. 554. The homestead exemption in this state is primarily for the protection of the family residing in this state and upon the homestead tract, the presumption being that if the family is residing elsewhere the state of its actual residence will look after its own, and the same should be equally true as to aliens in a foreign country. The homestead exemption in law should not be held to have ever existed, under the facts, in favor of defendant Nass or his family, at all times actually domiciled in and resident of a foreign country. To the foreign-born residents our state owes as much as they in return owe the state. But the state homestead statute should be interpreted as it is written and in the light of its intended benefits, as a protection to the resident head of a family actually or constructively resident within this state and upon the homestead tract. Nass comes neither within its letter nor spirit, for want of a family ever in America during his six years' residence here as a denizen. Nass might perhaps have possessed at one time a homestead claimant's right of homestead exemption, in spite of the absence of his family, if within a reasonable time after his arrival his efforts to found a family home had been diligent, actual, plainly manifest, in good faith, and accompanied with reasonable means to transport them here without undue delay. But any possible claim to such homestead rights had been lost long before he executed the mortgage in suit. His four years of subsequent inaction in such respect condemn any claim he might have otherwise urged, based alone on declared intentions to move his family here. Actions here "speak louder than words," and negative any actual intent to remove his family

to this country. Instead, the presumption is stronger that Nass will return to his family than that his family will follow him here. The wife's domicile cannot be held, under the circumstances, to follow the husband or be that of the husband. *Hascall v. Hafford*, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952, and note citing much authority. However, cases are in conflict as to homestead rights of a nonresident widow in a decedent's estate. (*Christie's Succession*, 20 La. Ann. 383, 96 Am. Dec. 411, and note collecting authority), though by weight of authority usually denied (Note in 21 L.R.A. 241).

This finding disposes of any claims of appellant Beaton which must necessarily be based upon homestead rights existing to Nass. The judgment appealed from is therefore affirmed.

FISK, J., did not participate in this decision.

WILLIAM G. HOERR v. GEORGE W. LYNN.

(147 N. W. 263.)

Opinion filed April 13, 1914.

Appeal from the District Court of Emmons County, *Winchester*, J. Reversed.

Watson & Young, Fargo, N. D., *Durment, Moore, & Oppenheimer*, St. Paul, Minn. (and *Ashley Coffman*, of St. Paul, Minn., of counsel), for appellant.

R. N. Stevens, Bismarck, N. D., *Harry C. Lynn*, Linton, N. D., and *Newton, Dullam, & Young*, Bismarck, N. D., for respondent.

PER CURIAM. The facts in this case are so similar to those in the case of *Patterson Land Co. v. Lynn*, ante, 391, 147 N. W. 256, filed in this court on the 6th day of March, 1914, the only difference being in the description of the lands, that such decision governs herein.

27 N. D.—29.

NELLIE DALLAS v. SARAH LUSTER, in Person, and as Executrix of the Estate of William H. Dallas, Deceased; George C. Trevan; Mrs. R. L. Webb; Eliza Wheeler; J. T. Trevan; Mrs. Carrie Trevan; Bell Luster; George Fuller; Tessie Brown; Mrs. Joe McCracken; Odesa Knott; and Little Dallas, whose true name is unknown.

(147 N. W. 95.)

Decree of divorce — action to vacate — absence of legal service — death of husband — maintainable — will — contest — fraud — undue influence.

*1. An action to vacate a decree of divorce, based upon the absence of legal service upon the defendant, is maintainable even after the death of her husband, when the same is instituted for the purpose of establishing the fact that she is the widow of the deceased, and entitled to maintain proceedings to contest his will on the ground of fraud and undue influence.

Summons — service by publication — provisions of law — strictly construed.

2. The provisions of § 6840, Rev. Codes 1905, relating to service by publication, are strictly construed, and must be strictly complied with.

Divorce action — want of legal service — judgment — motion to set aside — parties — waiver — general appearance — for specific purpose — does not relate back so as to validate the divorce proceedings — jurisdiction.

3. The lack of legal service in a divorce action is not waived by a subsequent motion by the wife in such action to show cause why the judgment "should not be vacated and set aside, and why the defendant should not have a judgment for the dismissal of said action, and such other and further relief as to the court shall seem just," and where such motion is denied for the reason that the plaintiff in the divorce action was dead, and that the property rights involved could not be considered by the court in the proceedings, as the proper and necessary parties were not before it. The motion, though in a sense a general appearance on account of the request for a dismissal of the action and further relief, is a general appearance merely for the purpose of any further proceedings that may be had on the reinstated action if the motion is granted and the judgment is vacated. It does not relate back so as to validate the divorce proceedings. Its only effect is to confer jurisdiction over the person of the movant from its date.

Note.—The authorities on the right to contest the validity of a divorce decree after the death of one or both of the parties are discussed in a note in 57 L.R.A. 583. And as to vacation of divorce decree after death of party, see note in 1 L.R.A. (N.S.) 551. See also note in 125 Am. St. Rep. 230.

Record — laches — not disclosed.

4. The record examined, and *held not to disclose proof of laches.*

Evidence — letters — objection — alteration.

5. An objection to the introduction of letters on the ground that they are incompetent and immaterial does not raise the point that they have been altered since their receipt.

Opinion filed April 13, 1914.

Appeal from the District Court of Williams County, *Fisk, J.*

Action to set aside a decree of divorce. Judgment for plaintiff. Defendant appeals.

Affirmed.

Palmer, Craven, & Burns, for appellants.

The marriage relation was severed by death and by the judgment entered, and the court will not set aside the judgment of divorce, unless there are property rights involved. *Ilite v. Mercantile Trust Co.* 156 Cal. 765, 106 Pac. 102; *Day v. Nottingham*, 160 Ind. 408, 66 N. E. 998; 1 Current Law, 950; 15 Current Law, 1432.

The insufficiency of the service in the former action, if any, was waived by general appearance, and cannot be raised in this case. *Henry v. Henry*, 15 S. D. 80, 87 N. W. 522.

Such appearance is, in itself, a confession that the court had jurisdiction of the person of defendant. *Wm. Deering & Co. v. Venne*, 7 N. D. 576, 75 N. W. 928; *Corbett v. Physicians' Casualty Asso.* 135 Wis. 505, 16 L.R.A.(N.S.) 177, 115 N. W. 365.

A party who seeks relief on the ground of want of jurisdiction must object on that ground alone, and keep out of court for all other purposes. *State ex rel. Thompson v. District Ct.* 51 Minn. 401, 53 N. W. 714; *Howland v. Jeuel*, 55 Minn. 102, 56 N. W. 581; 2 Elliott, Gen. Pr. § 475; 3 Cyc. 514, 515, 517; Note to *Corbett v. Physicians' Casualty Asso.* 16 L.R.A.(N.S.) 177; *Yorkey v. Yorkey*, 3 N. D. 343, 55 N. W. 1095.

If the truth or falsity of testimony given in a case in which judgment has been entered could be subsequently inquired into, there would be no end to litigation. *Graves v. Graves*, 132 Iowa, 199, 10 L.R.A.(N.S.) 216, 109 N. W. 707, 10 Ann. Cas. 1104; *Steele v. Culver* (South

Haven & E. R. Co. v. Culver) 157 Mich. 344, 23 L.R.A.(N.S.) 564, 122 N. W. 95; Reeves v. Reeves, 24 S. D. 435, 25 L.R.A.(N.S.) 574, 123 N. W. 869.

In actions of this character, the plaintiff should show, by clear and convincing proof, that plaintiff in the divorce action was guilty of having practised fraud and deception, and had prejudiced her rights. Pico v. Cohn, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Reeves v. Reeves, 24 S. D. 435, 25 L.R.A. (N.S.) 574, 123 N. W. 869.

The absence of plaintiff's relatives, or their depositions as to her residence at time of divorce case, is not explained. 16 Cyc. 1062.

There were erasures and alterations in the purported letters of plaintiff's husband, favorable to plaintiff. This fact raises a presumption against such evidence, unless fully explained away. Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467.

Such alterations must be explained, and the burden is upon the party offering such letters, to make full and satisfactory explanation. Cass County v. American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; 2 Cyc. 242; 1 Cyc. 815; Smith v. United States, 2 Wall. 219, 17 L. ed. 788; Tillou v. Clinton & E. Mut. Ins. Co. 7 Barb. 564; Acker v. Ledyard, 8 Barb. 514; O'Donnell v. Harmon, 3 Daly, 424; Huntington v. Finch, 3 Ohio St. 445; Wilde v. Armsby, 6 Cush. 314; 11 Enc. Ev. 953, note 8.

The fact that a part of the written letter has been cut off was a suspicious circumstance, throwing the onus on the respondent to fully explain. Burton v. American Guarantee Fund Mut. F. Ins. Co. 88 Mo. App. 392; Stillwell v. Patton, 108 Mo. 352, 18 S. W. 1075; Drosten v. Mueller, 103 Mo. 624, 15 S. W. 967; 11 Enc. Ev. 956; Baldwin v. Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841; Speer v. Speer, 7 Ind. 178, 63 Am. Dec. 418; Rudolph v. Lane, 57 Ind. 115.

Aaron J. Bessie and Palda, Aaker, & Greene, for respondents.

The affidavit, made in the original or divorce action, to lay the foundation for the service of the summons by publication, was wholly defective. It is largely on information and belief, and no reference is made to any return of the sheriff, or that any diligence was used to ascertain the residence of the defendant in such action. The court

obtained no jurisdiction therein, and the divorce was void. Rev. Codes 1905, § 6840, subdiv. 3; *Roberts v. Enderlin Invest. Co.* 21 N. D. 594, 132 N. W. 145; *Yorke v. Yorke*, 3 N. D. 351, 55 N. W. 1095.

BRUCE, J. This is an action by a wife to vacate a decree of divorce. Though brought after the death of the husband, it is based upon a theory of property rights, and is instituted in order that the plaintiff may take proceedings to contest the will of her husband and recover her just share of his estate.

Being based upon property rights, the action is maintainable. *Hite v. Mercantile Trust Co.* 156 Cal. 765, 106 Pac. 102; *Day v. Nottingham*, 160 Ind. 408, 66 N. E. 998. Since there was no legal service upon the wife (the present plaintiff) in the original action, the judgment should be vacated and set aside. There was no personal service upon the then defendant, and no appearance by her or knowledge by her of the proceedings. The affidavit for publication of the summons was altogether insufficient. It was made by the attorney for the plaintiff, and went merely to the extent of the knowledge of that attorney. No attempt was therein made, even upon information and belief, to show that the plaintiff himself had no knowledge of the defendant's place of residence or address. There was in it no proof or even any statement of any effort, either on the part of the attorney or of his client, to ascertain her whereabouts. There was no proof even of the mailing of a copy of the summons and complaint to the defendant's last known address. The fact that defendant was not a resident of the state was merely asserted upon the belief of the attorney. The provisions of § 6840, Rev. Codes 1905, relating to service by publication, were, in short, totally ignored. That they must be strictly compliant with them is and should be the invariable rule and holding of this court. *Roberts v. Enderlin Invest. Co.* 21 N. D. 594, 132 N. W. 145. Nor were the defects cured and the proceedings validated by the subsequent appearance of the defendant wife in the action by a motion in which she prayed for an order to show cause why the judgment entered in the action "should not be vacated and set aside, and why the defendant should not have judgment for a dismissal of said action, and such other and further relief as to the court shall seem just." This, it is true, was to all intents and purposes a general appearance, and

was made such by the prayer for the dismissal and the further relief. It is true that to be a special appearance it should have stopped at merely asking for the vacation of the judgment. *Corbett v. Physicians' Casualty Co.* 135 Wis. 505, 16 L.R.A.(N.S.) 177, 115 N. W. 365; *Henry v. Henry*, 15 S. D. 80, 87 N. W. 522; *William Deering & Co. v. Venne*, 7 N. D. 576, 75 N. W. 926; 3 Cyc. 514, 515, 517.

It was however, a general appearance merely for the purposes of any further proceedings that might be had on the reinstated action if the motion had been granted and the judgment had been vacated. "It did not relate back so as to validate the void proceedings. Its only effect was to confer jurisdiction over the person of the defendant from its date." *Yorke v. Yorke*, 3 N. D. 351, 55 N. W. 1095; *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708.

The court having overruled the motion and dismissed the order to show cause, "for the reason that plaintiff in said action is dead, and said action, which was an action for divorce, was or would be thereby terminated by the death of said party, and that any property or rights which might be involved by reason of said decree cannot be considered by this court in this proceeding, for the reason that proper parties interested in any property or property rights were not made parties to said proceeding," the situation was the same as if the motion had never been made. Nothing then precluded the present plaintiff and the then defendant from bringing her own and independent action in equity, in which she could make parties defendant all who had any interest in the matter, and this she has done.

Nor should relief be denied her on the ground of laches. She did not learn of the decree until about July 1, 1911. She made her motion to vacate the judgment on or about August 3d, 1911. This motion was denied on September 8th, 1911. On August 5th, 1911, she started proceedings to contest the will of her husband, and on or about the 16th day of March, 1912, she commenced the present action. We find no evidence, in the record, of any unreasonable delay when we consider the necessity of preparing the bill in equity and obtaining the information necessary thereto; nor can we see any ulterior motive therein, or that any material injury has been occasioned to the defendants thereby. We know of no case in which a delay as limited as that in the case at bar has, of and in itself, been held to preclude the plaintiff from obtaining relief.

Having found that the court was entirely without jurisdiction in the divorce proceeding, on account of the want of personal service and an absolute failure to comply with the terms of § 6840, Rev. Codes 1905, when service by publication was sought, it is unnecessary for us to examine the evidence in the case for the purpose of discovering whether the deceased was guilty of fraud in the matter, and whether or not he sought to deceive her in regard to the institution of the proceedings. Nor is it necessary for the plaintiff to now meet or deny the charges in the deceased's bill of complaint. It is sufficient to say that she was his wife at the time of his decease, and is now his widow. The divorce proceedings abated on his death. The plaintiff is not in default, and never was. She is not required, as a ground for relief, to show evidence of a good and meritorious defense. She merely asks to be relieved of a judgment to which she was not a party in the eyes of the law, and which is not voidable upon consideration merely, but absolutely void.

The same considerations apply, to a greater or less degree, to the claim of the defendant that some of the letters which were introduced by the plaintiff had been tampered with before their introduction.

Not only were the facts which were sought to be proven by these letters not necessary to be proved, the lack of service being once shown, but no objection to their introduction was made upon the ground of their alteration. The only objection, indeed, was that they were incompetent and immaterial.

The judgment of the District Court is affirmed.

Goss, J., being disqualified, did not participate.

GEORGE W. LYNN v. W. G. HOERR.

(147 N. W. 264.)

Judgment — stipulation — motion to be relieved from — appeal — errors — moot questions — dismissal.

Opinion filed April 13, 1914.

Appeal from the District Court of Emmons County, *Winchester, J.* Dismissed.

Watson & Young, Fargo, N. D. (*Durment, Moore, & Oppenheimer*, and *Ashley Coffman*, of St. Paul, Minn., of counsel), for appellant.

R. N. Stevens, Bismarck, N. D., *Harry C. Lynn*, Linton, N. D., and *Newton, Dullam, & Young*, Bismarck, N. D., for respondent.

PER CURIAM. This appeal involves a motion of the defendant to be relieved from a judgment taken against him upon stipulation. The lands in controversy are those involved in the four cases of *Patterson Land Co. v. Lynn*, ante, 391, 147 N. W. 256; *Hackney v. Lynn*, post, 458, 147 N. W. 263; *Hoerr v. Lynn*, ante, 449, 147 N. W. 263; and *Boyn-ton v. Lynn*, post, 457, 147 N. W. 263, recently decided by this court. The four cases mentioned above settle the entire controversy, and there is no necessity for a decision upon the errors herein assigned, the same being now merely moot questions. The appeal will be dismissed.

GEORGE W. LYNN v. PATTERSON LAND COMPANY.

(147 N. W. 264.)

Opinion filed April 13, 1914.

Appeal from the District Court of Emmons County, *Winchester, J.* Dismissed.

Watson & Young, Fargo, N. D. (*Durment, Moore, & Oppenheimer*, and *Ashley Coffman*, of St. Paul, Minn., of counsel), for appellant.

R. N. Stevens, Bismarck, N. D., *Harry C. Lynn*, Linton, N. D., and *Newton, Dullam, & Young*, Bismarck, N. D., for respondent.

PER CURIAM. This appeal involves a motion of the defendant to be relieved from a judgment taken against him upon stipulation. The lands in controversy are those involved in the four cases of Patterson Land Co. v. Lynn, ante, 391, 147 N. W. 256; Hackney v. Lynn, post, 458, 147 N. W. 263; Hoerr v. Lynn, ante, 449, 147 N. W. 263; and Boynton v. Lynn, below, 147 N. W. 263, recently decided by this court. The four cases mentioned above settle the entire controversy, and there is no necessity for a decision upon the errors herein assigned, the same being now merely moot questions. The appeal will be dismissed.

CARLOS N. BOYNTON v. GEORGE W. LYNN.

(147 N. W. 263.)

Opinion filed April 13, 1914.

Appeal from the District Court of Emmons County, *Winchester*, J. Reversed.

Watson & Young, Fargo, N. D. and *Durment, Moore, & Oppenheimer*, St. Paul, Minn. (and *Ashley Coffman*, of St. Paul, Minn., of counsel), for appellant.

R. N. Stevens, Bismarck, N. D., and *Harry C. Lynn*, Linton, N. D., and *Newton, Dullam, & Young*, Bismarck, N. D., for respondent.

PER CURIAM. The facts in this case are so similar to those in the case of Patterson Land Co. v. Lynn, ante, 391, 147 N. W. 256, filed in this court on the 6th day of March, 1914, the only difference being in the description of the lands, that such decision governs herein.

JOSEPH M. HACKNEY v. GEORGE W. LYNN.

(147 N. W. 263.)

Opinion filed April 13, 1914.

Appeal from the District Court of Emmons County, *Winchester*, J. Reversed.

Watson & Young, Fargo, N. D., *Durment, Moore, & Oppenheimer*, St. Paul, Minn. (and *Ashley Coffman*, of St. Paul, Minn., of counsel), for appellant.

R. N. Stevens, Bismarck, N. D., *Harry C. Lynn*, Linton, N. D., and *Newton, Dullam, & Young*, Bismarck, N. D., for respondents.

PER CURIAM. The facts in this case are so similar to those in the case of *Patterson Land Co. v. Lynn*, ante, 391, 147 N. W. 256, filed in this court on the 6th day of March, 1914, the only difference being in the description of the lands, that such decision governs herein.

MARY A. BUSSEY and Nella B. Adams, Suing for the Use of Geo.
W. Lynn. v. CARLOS N. BOYNTON.

(147 N. W. 264.)

Stipulation — judgment — motion to be relieved from — appeal — errors — moot questions — dismissal.

Opinion filed April 13, 1914.

Appeal from the District Court of Emmons County, *Winchester*, J. Dismissed.

Watson & Young, Fargo, N. D. (*Durment, Moore, & Oppenheimer*, and *Ashley Coffman*, of St. Paul, Minn., of counsel), for appellant.

R. N. Stevens, Bismarck, N. D., *Harry C. Lynn*, Linton, N. D., and *Newton, Dullam, & Young*, Bismarck, N. D., for respondents.

PER CURIAM. This appeal involves a motion of the defendant to be relieved from a judgment taken against him upon stipulation. The lands in controversy are those involved in the four cases of *Patterson Land Co. v. Lynn*, ante, 391, 147 N. W. 256; *Hackney v. Lynn*, ante, 458, 147 N. W. 263; *Hoerr v. Lynn*, ante, 449, 147 N. W. 263; and *Boyn-ton v. Lynn*, ante, 457, 147 N. W. 263, recently decided by this court. The four cases mentioned above settle the entire controversy, and there is no necessity for a decision upon the errors herein assigned, the same being now merely moot questions. The appeal will be dismissed.

SCHOOL DISTRICT NO. 94, a Corporation, v. C. M. THOMPSON, Frank T. Rice, David B. Shaw, Louis Stein, George W. Kelly, Con-stituting the Board of Education of the Village of Tower City, North Dakota, and Addison Leach, County Auditor of Cass County, North Dakota.

(146 N. W. 727.)

Special school district — officers — annexation of territory — injunction — indebtedness — debt limit — constitution — issues for trial — petition-ers — residents — school voters of territory.

1. Plaintiff seeks to perpetually enjoin defendants, as officers of a special school district, from annexing certain adjacent territory to such district for school purposes, under § 133, chap. 266, Laws of 1911, alleging as grounds for such relief that the special district had unlawfully incurred an indebtedness exceeding the constitutional debt limit, and also that the petition for such annexation was not signed by qualified school voters in such adjacent territory.

Held, that the first ground alleged is of no avail, it being wholly immaterial under such statute.

Note.—On the question who may petition in relation to school matters, see note in 43 L.R.A.(N.S.) 293.

Held, further, that the sole issue for trial under the pleadings is whether the signers of the petition were in fact residents and school voters in such adjacent territory, and on trial *de novo* the trial court's finding thereon in defendants' favor is adopted by this court.

Petition for annexation — adjacent territory — facts set forth — jurisdictional prerequisites — board to determine — before acting.

2. The petition for the annexation of adjacent territory to a special district for school purposes need not set forth all the facts, the existence of which is required by the statute to authorize the board to act. It is for the board of the special district to determine, before allowing such petition, whether the jurisdictional prerequisites in fact exist authorizing it to grant the prayer of the petitioners.

Petitioners — real property — owners — immaterial — school voters only.

3. The fact that the petitioners were not owners of the real property sought to be annexed is not material, the statute merely requiring that they be school voters in such adjacent territory. Nor does the fact that such petitioners contemplated a removal from such lands at a future time, disqualify them from acting while they remained such voters.

Petition — notice of hearing — published — posting.

4. Appellant's contention that the notice of hearing on such petition was not published as required by § 133, *supra*, held untenable. One publication of such notice in the nearest newspaper fourteen days prior to the hearing, and posting the same in the manner prescribed in the above section, is all that was contemplated by the legislature.

Opinion filed April 6, 1914. On petition for rehearing April 14, 1914.

Appeal from District Court, Cass County, *Chas. A. Pollock, J.*
From a judgment in defendants' favor, plaintiff appeals.
Affirmed.

Melvin A. Hildreth, for appellant.

The petition must show that the territory proposed to be annexed is outside the limits of the special district, but adjacent thereto. *Laws, 1911, § 133, chap. 266; Redfield School Dist. v. Redfield Independent School Dist. 14 S. D. 229, 85 N. W. 180.*

It will not do to say that the board of education of the special school district found that the territory described in the petition was outside the limits of such district, but adjacent thereto. The petition itself must show such facts. *Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499.*

The notice of the hearing on the petition must be published in every issue of a weekly paper issued before the date of the hearing. One publication and posting are insufficient. *Union P. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619; *Union P. R. Co. v. McNally*, 54 Neb. 112, 74 N. W. 390; *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768.

The annexation of the territory in question was unjust, in that the owners of the land in such territory had no voice in the matter, and that it places an added burden on District No. 94. *State ex rel. Hammond v. Dimond*, 44 Neb. 154, 62 N. W. 498; *Wahoo v. Tharp*, 45 Neb. 563, 63 N. W. 840.

A. A. Twichell and Pollock & Pollock, for respondents.

When such petition is presented, the board, after ascertaining that the necessary facts actually exist, may make its order, if it deems it for the best interests of all the territory affected. The mere *form* of the petition is not jurisdictional. *Laws, 1911, § 113, chap. 166*; *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499; *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958.

The board, by virtue of the petition, has jurisdiction of the subject-matter, and the presumption is that its findings are based upon competent proof and are correct. *Redfield School Dist. v. Redfield Independent School Dist.* 14 S. D. 229, 85 N. W. 180.

Matters of indebtedness may be adjusted. *Laws, 1911, §§ 217-221, chap. 266, p. 455.*

FISK, J. Plaintiff school district seeks to perpetually enjoin the defendants, as members of the board of education of the village of Tower City, and the defendant, Addison Leach, as county auditor of Cass county, from doing any act looking to the transfer for school purposes of sections 6 and 7, the west half of section 5, and the west half of section 8, all in township 140 north of range 55 west, lying and being in Cass county, from plaintiff school district to the special school district of the village of Tower City. Such transfer was sought to be effected pursuant to § 133 of chapter 266, Laws of 1911. The section reads as follows:

“When any special school district has been organized and provided

with a board of education under any general law, or a special act, or under the provisions of this article, territory outside the limits thereof, but adjacent thereto, may be attached to such special school district by the board of education thereof, upon application in writing signed by a majority of the voters of such adjacent territory; provided, that no territory shall be annexed which is at a greater distance than 3 miles from the central school in such special district, except upon petition signed by two thirds of the school voters residing in the territory which is at a greater distance than 3 miles from the central school in such special district; and upon such application being made, if such board shall deem it proper and to the best interests of the school of such corporation and of the territory to be attached, an order shall be issued by such board attaching such adjacent territory to such corporation for school purposes, and the same shall be entered upon the records of the board. Such territory shall, from the date of such order, be and compose a part of such corporation for school purposes only. Such adjacent territory shall be attached for voting purposes to such corporation, or, if the election is held in wards, to the ward or wards or election precinct or precincts to which it lies adjacent; and the voters thereof shall vote only for school officers and upon such school questions; provided, that nothing in this act shall prevent any such adjacent territory from being annexed because of such adjacent territory being in an adjoining county, and provided, that the county commissioners may detach any part of such adjacent territory which is at a greater distance than 3 miles from the central school in such special district, and attach it to any adjacent common or special school district or districts upon petition to do so, signed by three fourths of the legal voters of such adjacent territory; provided, further, that in all cases fourteen days' notice of a hearing before the board shall be given, by publication in the nearest newspaper and posted notices in conspicuous places, three in the special district, three in the territory sought to be annexed, and three in the district remaining from which the territory shall be taken. And such territory shall not become a part of the special district until five days after such hearing, upon order of the board as hereinbefore provided; and all assets and liabilities shall be equalized according to § 217."

The grounds alleged in the complaint as a basis for the relief prayed

for are, first. That the school board of such special school district, sometime prior to the attempted annexation of such territory, erected a large school building in Tower City, and in doing so greatly exceeded the debt limit in violation of the Constitution of the state, which limits the indebtedness of each school district to a sum not exceeding 5 per cent of the taxable property of the district; and,

Second. That the petition asking for the annexation of such territory to such special school district is null and void for the reason, as alleged, that the same was not signed by a majority of the voters of the territory sought to be annexed. Nor was it signed by two thirds of the school voters residing in that portion of the territory sought to be annexed, which is located at a greater distance than 3 miles from the center of such special school district. The petition which was thus presented to the board of education of the special school district of Tower City on September 12, 1911, was signed by G. H. Miller, Mrs. G. H. Miller, H. Delange, and Mrs. H. Delange, and it is alleged in the complaint that these persons were not bona fide voters and residents of the territory thus sought to be transferred. These allegations were put in issue by the answer, and at the conclusion of the trial of such issues in the district court of Cass county the learned trial judge made its findings and conclusions thereon favorable to the defendants, ordering a judgment in their favor for a dismissal of the action, with costs. Judgment was thereupon entered accordingly, and plaintiff appeals therefrom, and demands a trial *de novo* in this court.

In such trial *de novo* this court is, of course, confined to the issues framed by the pleadings and which were tried in the court below; and as we construe the complaint, but one question of fact is involved, which is whether the persons who signed the petition for the transfer of such territory from plaintiff district to the special school district aforesaid were residents and qualified school voters in the territory attempted to be transferred. The fact, if it be a fact, that such special school district had incurred an indebtedness exceeding the constitutional debt limit, is in no way material, as the legislature has not seen fit to provide that such fact shall operate to prevent such an annexation of adjacent territory. The mass of testimony contained in the record relating to such alleged fact is therefore wholly immaterial and irrelevant, and the

learned trial judge no doubt so held, as no finding was made thereon by him.

Near the close of the trial plaintiff's counsel asked leave to amend paragraph 4 of the complaint by inserting the following: "And said petition and the order and proceedings thereon were wholly void and of no effect, the said defendants never having complied with the provisions of the statute with reference to annexing said property claimed to have been annexed, and never acquired jurisdiction over the subject-matter for the purpose of annexing said property as described in the petition, or any part thereof." Such amendment was allowed over defendants' objection, but the same, as the trial court remarked, alleges nothing but legal conclusions, and does not operate to change the issues in any particular.

It follows that the sole issue of fact for retrial in this court is whether the persons who signed the petition which was presented to the board of the special school district, and acted upon by such board on the 12th and 29th days of September, 1911, were residents and school voters in such territory on said dates. After reading and considering the testimony relating to such issue, we have no hesitancy in adopting the findings of the trial court on this issue. In fact, we are unable to perceive how the trial court could have made any different finding on this question. The testimony is very voluminous, and we shall not attempt to review the same in this opinion, as no useful purpose would be subserved thereby.

In his printed brief, counsel for appellant raises some questions which it does not appear were raised in the lower court, and which certainly were not raised by the pleadings. However, we will briefly notice them.

It is contended that the petition for the transfer of such territory was defective because it failed to set forth that the territory sought to be annexed was "outside of the limits of the special district, but adjacent thereto." Such contention is, we think, untenable. The statute does not seem to contemplate that the petition shall set forth all the facts made necessary under the law to authorize the board to act. It is for the board to determine, before taking action on such petition, whether the jurisdictional prerequisites in fact exist which such statute prescribes, but the petition need not show the existence thereof. The case

of Redfield School Dist. v. Redfield Independent School Dist. 14 S. D. 229, 85 N. W. 180, cited by appellant's counsel, is not an authority in appellant's favor. On this point see Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499, and cases cited at page 397 of the opinion. The board clearly had jurisdiction to act on the petition, and the proof discloses that the petitioners were the only resident school voters in such adjacent territory. The good faith of the petitioners, as well as the members of the board, cannot be questioned. The fact that the petitioners were not owners of the real property is not material. The statute does not require this. It merely requires that they be school voters in the territory. Nor does the fact that such petitioners contemplated a removal at some future time from lands disqualify them from acting while they remained such voters. If the annexation of these lands to the special district works a hardship to the owners, the remedy lies with the legislature, not the courts.

It is also contended that the notice was not published as required by law, in that publication thereof was made in but one issue of the newspapers published nearest the land. The statute above quoted requires "fourteen days' notice" of the hearing to be given "by publication in the nearest newspaper, and posted notices in conspicuous places, three in the special district, three in the territory sought to be annexed, and three in the district remaining from which the territory shall be taken." No question as to the proper posting thereof is raised, but counsel contends that the same should have been published in each issue of the paper during the fourteen days' period prior to the hearing, citing numerous cases claimed to support his views. We do not think the statute, as fairly construed, warrants such construction. If the legislature meant to require a continuance of the publication during such period, it no doubt would have specifically so prescribed by using apt language to indicate such intent. Wherever the legislature has intended that a notice shall be published for a designated period, it has used language clearly indicating such intent. The authorities relied on by appellant's counsel are based on statutory language materially differing from that employed in the act in question, and we do not consider them in point.

Another answer might be made to appellant's contention on this point. The record shows that it had actual notice of such petition

and of the hearing thereon, for it appears that plaintiff, prior to the hearing, filed a written protest with the special school district board against the proposed annexation of such territory, and it therefore ought not to be heard to urge in this action, nor did it in fact urge in such protest, a failure to give due notice of the hearing.

Another matter not mentioned by respondents' counsel, but which we think might be urged as a complete answer to plaintiff's right to maintain this action against the members of this special district board, is that the acts sought to be enjoined, as disclosed both by the complaint and by the proof, were performed and fully completed prior to the commencement of the action. It is, of course, well settled that equity will not enjoin acts already done. 22 Cyc. 759, and cases cited. We choose, however, to place our decision in this case upon the broad grounds that plaintiff has failed to prove the allegations of its complaint, and that it appears that the proceedings with reference to the annexation of such territory were in substantial conformity with the statute. We merely mention the last two propositions for the information of counsel and of the bar generally.

The judgment is affirmed.

On Petition For Rehearing.

In a petition for rehearing herein counsel for appellant urges that defendants are estopped from annexing such adjacent territory to the special district, by reason of a judgment entered adversely to them in a prior action involving the validity of certain proceedings for the annexation of the lands here involved and other adjacent territory. We deem it clear that such contention is devoid of merit, for the reason that by such prior annexation proceedings a large amount of territory was sought to be thus annexed, in addition to that involved in the proceedings here in controversy, and the decision of the court annulling such proceedings and enjoining the proposed annexation of such territory was placed upon the ground that the petition was absolutely null and void and of no effect, and therefore conferred no jurisdiction upon the board of the special district, because such petition was not signed by the requisite number of legal voters of the territory thus sought to be annexed. We fail to see how such decision should operate to estop

such board from thereafter acting upon a legal petition when presented. As before stated, the last petition embraced but a portion of the territory described in the first petition, and the same was signed by all the legal voters therein.

Counsel calls our attention to a New York authority holding that an estoppel *in pais* may be proven, although not pleaded. While it is unnecessary, in view of our holding as above stated, to determine the rule in such cases, and we will not do so, we respectfully call attention to 8 Enc. Pl. & Pr. p. 7, wherein it is stated that under the Code system the great weight of authority is to the effect that the facts constituting an estoppel *in pais*, to be available, must, except in a few cases, be specially pleaded.

Petition denied.

**NORTHERN IMMIGRATION ASSOCIATION, a Corporation, v.
FRANK C. ALGER.**

(147 N. W. 100.)

Land broker — contracts — sales — commissions — principal and customer — brought together through his efforts — price.

1. When a land broker's contract is to bring parties together, and for a commission when his act of bringing them together results in a sale, his commission is earned when his principal and a customer are brought into contact by his efforts and a sale is consummated, even though it may not be on the terms or for the price originally proposed.

Land broker — principal — customer — sale — entitled to commissions — negotiations — continued by successor — notice of — no objections.

2. A land broker, after correspondence with his principal resulting in bring-

Note.—The question as to when a broker has earned his commission is treated in a note in 139 Am. St. Rep. 225.

As to the right to commission where broker procures purchaser at price stated by his principal, but on slightly different terms in regard to cash or time of payment, and the owner refuses to consummate the sale, see note in 21 L.R.A.(N.S.) 935. And upon the effect of a contract expressly making broker's right to commissions dependent upon "sale" of property or other condition beyond that ordinarily implied, see note in 29 L.R.A.(N.S.) 533.

ing a purchaser to the principal, is entitled to his commission, even though before the trade was completed he became connected with a corporation, and turned the remainder of the negotiations over to the corporation, he having notified his principal of the fact, and the principal having made no objection, and having carried on the remainder of the correspondence and dealings with the corporation the same as though the original party had still continued as a party to their transactions.

Evidence — sufficient to sustain verdict — awarding commissions — sale.

3. Evidence examined, and *held* sufficient to sustain the verdict of a jury awarding commissions for bringing an owner and purchaser together and resulting in a sale of a half section of land.

Opinion filed April 15, 1914.

Appeal from judgment of the District Court of Mountrail County,
Frank E. Fisk, J.

Affirmed.

Palmer, Craven, & Burns, for appellant.

The contract proved must be the contract pleaded. Such a contract must be fully set forth in the complaint, and the proof must conform thereto. *Kane v. Sherman*, 21 N. D. 249, 130 N. W. 222; 19 Cyc. 275; *Steere v. Gingery*, 21 S. D. 183, 110 N. W. 774.

The mere fact that the broker brought the parties together—introduced them—is not enough to entitle him to a commission. He must be the procuring cause of the sale. *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706; *Bouscher v. Larkins*, 84 Hun, 288, 32 N. Y. Supp. 305; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 38 Am. Rep. 441; *Singer & T. Stone Co. v. Hutchinson*, 61 Ill. App. 308; *Putman v. How*, 39 Minn. 363, 40 N. W. 258; *Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 345; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 719.

After the broker had failed to make a sale or procure a purchaser, and the principal then made the sale, the broker was not entitled to commissions. 19 Cyc. 257.

The broker cannot abandon the employment, leaving the landowner to work up a sale alone, and then recover commissions as though he had fulfilled his contract. 19 Cyc. 250, 251, 278; *Wylie v. Marine Nat.*

Bank, 61 N. Y. 416; Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441.

Henry J. Linde, for respondent.

The use of the terms, "for sale," or "to sell," means no more than to negotiate a sale by finding a purchaser who buys upon satisfactory terms. *Keim v. Lindley*, — N. J. Eq. —, 30 Atl. 1063.

Such a contract is fully satisfied, and the agreed commission earned, when a purchaser is found. *Terry v. Reynolds*, 111 Wis. 122, 86 N. W. 557; *Glentworth v. Luther*, 21 Barb. 145.

Where the sale is made upon different terms than those mentioned originally between the principal and broker, and the principal assents to such new terms of sale, and the deal is so closed, the agent or broker is entitled to compensation as fixed by his original contract. *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253; *Huntemer v. Arent*, 16 S. D. 465, 93 N. W. 653; *Knowles v. Harvey*, 10 Colo. App. 9, 52 Pac. 46; *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. 346; *Potvin v. Curran*, 13 Neb. 302, 14 N. W. 400; *Welch v. Young*, — Iowa, —, 79 N. W. 59; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 163, 42 N. E. 134; *McFarland v. Lillard*, 2 Ind. App. 160, 52 Am. St. Rep. 234, 28 N. E. 229; *Ratts v. Shepherd*, 37 Kan. 20, 14 Pac. 496; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Anderson v. Smythe*, 1 Colo. App. 253, 28 Pac. 479; *Bell v. Kaiser*, 50 Mo. 150; *Lloyd v. Matthews*, 51 N. Y. 124; *Nesbitt v. Hesler*, 49 Mo. 384; *Gelatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683, 23 S. W. 882; *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074; *Willey v. Rutherford*, 108 Wis. 35, 84 N. W. 14; *Scott v. Patterson*, 53 Ark. 49, 13 S. W. 419; *McConaughy v. Mahannah*, 28 Ill. App. 169; *Somers v. Wescott*, 66 N. J. L. 551, 49 Atl. 462; *McMillen v. Beves*, 77 C. C. A. 444, 147 Fed. 218; *Johnson v. Hayward*, 74 Neb. 157, 5 L.R.A.(N.S.) 112, 103 N. W. 1058, 107 N. W. 384, 12 Ann. Cas. 800; *Tinges v. Moale*, 25 Md. 480, 90 Am. Dec. 73; *Livezy v. Miller*, 61 Md. 343; *Lapsley v. Holridge*, 71 Ill. App. 652; *Loehde v. Halsey*, 88 Ill. App. 452; *French v. McKay*, 181 Mass. 485, 63 N. E. 1068; *Wolverton v. Tuttle*, 51 Or. 501, 94 Pac. 961; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *Ratts v. Shepherd*, 37 Kan. 20, 14 Pac. 496; *Veazie v. Parker*, 72 Me. 443; *Finnerty v. Fritz*, 5 Colo. 174; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Stewart v.*

Mather, 32 Wis. 344; *Lincoln v. McClatchie*, 36 Conn. 136; *Cook v. Fiske*, 12 Gray, 491; *Bell v. Kaiser*, 50 Mo. 150; *Jones v. Adler*, 34 Md. 440; *Scott v. Clark*, 3 S. D. 486, 54 N. W. 538; *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642; *Goldsmith v. Coxe*, 80 S. C. 341, 61 S. E. 555; *Wright v. McClintock*, 136 Ill. App. 438.

The jury in the lower court found against the defendant, and such finding should be accepted by this court. *Knowles v. Harvey*, 10 Colo. App. 9, 52 Pac. 46.

SPALDING, Ch. J. This action was brought to recover compensation claimed to be due from the defendant to the plaintiff. Briefly, the complaint alleges that on April 1, 1911, the defendant was the owner of, and, for the purpose of effecting a sale or exchange thereof, had the control of, certain lands, consisting of 320 acres, situate in the county of Mountrail. That he was at that time attempting to get into communication with some suitable person to whom he could effect a sale, or with whom he could negotiate an exchange of said land for other property, and for that purpose requested the services of one Hart, and in due course employed him to place him in communication with someone with whom he could negotiate such exchange of property; and for such service, if rendered, he agreed to pay said Hart \$480. That one Crabbe was the owner of certain live stock and a buggy and harness, and that, pursuant to the contract aforesaid, Hart interested said Crabbe in the subject of an exchange of his personal property for the land in question; and thereupon, and about the 4th of April, 1911, communicated to the defendant information as to the fact that said Crabbe was a prospective customer, and with whom such exchange might be consummated. That by reason of these facts the defendant negotiated with said Crabbe personally, and in due time, as the result of the services and assistance of said Hart, consummated an exchange of properties, whereby the defendant became the owner of the personal property aforesaid, and Crabbe the owner of said 320 acres of land. That defendant has never paid any part of the said sum of \$480 agreed upon, except the sum of \$100. That on the 6th of June, 1911, Hart sold and assigned said account and indebtedness to the plaintiff. The answer, so far as material, denies the request for the services of Hart and his employment by defendant, or that by reason thereof he placed defendant in

communication with said Crabbe, but does allege that about the 13th of March, 1911, Hart informed defendant that he had a customer at Fargo for the land in question, on certain terms of exchange for said personal property. That thereafter such customer, it being said Crabbe, went to the office of the defendant in Stanley, North Dakota, and informed him that he was the party about whom Hart had written the defendant, and that he desired to look at the lands with a view to making the exchange as indicated by Hart. He then pleads some variation between the list of property as enumerated in Hart's correspondence, and its character, and the facts as given him by Crabbe on the trip to Fargo with Crabbe; and alleges upon being advised as to such discrepancies, or false representations, as they are termed, he declined to proceed further in effecting an exchange of the lands for the personal property; and alleges damages of \$100 by way of defense, and that Hart took possession of a buggy, which belonged to defendant, of the value of \$225, and appropriated it to his own use. Trial was had, which resulted in a verdict of \$380 in favor of plaintiff. From such judgment and an order denying a new trial defendant appeals.

The contract between the parties is evidenced by correspondence, to which reference is made for an understanding of the facts.

In exhibit B, dated February 4, 1911, the defendant writes Hart, and inquires if he is in a position to co-operate with him in selling some cheap lands in his vicinity, and informs him that he has some money-making propositions to offer.

Exhibit F is a letter dated February 7, 1911, from Hart to defendant, informing him that he is living in Valley City, instead of McHenry, where exhibit B was addressed, and asks what arrangements he can make to do business with him, and if he can get a list.

Exhibit G, dated February 9, 1911, is the reply of defendant to Hart, in which he says that his proposition is substantially as follows: "I get contracts and options at the lowest price and best terms possible, and show land, and do all I can to effect sales. You get purchasers here, and come with them if possible, and assist in closing deals." He then informed him that his railroad fare would be first deducted from commissions and the remainder divided equally, and that in all cases they should get at least \$3 per acre, and in most cases much more, but that they should not let a buyer get away, if he had any money, as he

had plenty of land to work on. He gave him further information about his list, and invited him to visit him, and said that he thought they could do a land office business.

Exhibit A, dated February 17, 1911, is another letter from defendant, calling attention to his former letters and that he had not received a reply, and asking what Hart thought of his proposition; and stating further that he would pay him a commission of \$1.50 cash on all sales if he preferred it to his other offer. He also inclosed a small list of lands, and invited a reply.

February 22, 1911, by exhibit C, Hart replied that the list was very attractive; that he would like to co-operate, but as the weather was yet bad he had not done much, but that he would like a full description of Nos. 5 and 8 of the list. He informed him that he had a couple of customers that would buy as soon as spring opened, and made other inquiries not here material.

Exhibit H, dated February 24, is defendant's reply. He refers to the subject of Hart aiding him in selling land, and that tracts 5 and 8 were his, and were listed with Hart subject to prior sale. He described also No. 5 on the list, and said he had a deed to both tracts, and that he (Hart) could continue to work on them unless sold. He then submits a proposition as to 160 acres 4 miles north of Ross, with terms, etc.

Exhibit I is Hart's reply, in which he refers to No. 8 and No. 5, and says he is trading this land, and will expect to pay \$400 in cash and assume the mortgage, and inquires if this is right. That he had a customer for No. 7, and would show it as soon as the snow was off.

Exhibit D, dated March 9, 1911, informs Hart that defendant has listed the northwest quarter of section 33, township 157, range 92, which is one of the tracts involved in this action; that it cornered No. 8, for which he said Hart had the deal. He describes the quarter of 33, and prices, and says it is owned by a woman who wants to sell or trade for something that she can rent, and inquires if Hart thinks he can do anything with the proposition.

Exhibit J, dated March 13, 1911, is a letter from Hart to defendant, in which he informs him that he is going to quote the northwest of 33 and No. 8, which it corners, to a man in Fargo, in a trade for stock. He gives the price, and says, "I would expect to turn these horses and cattle over to you, or we will dispose of them here, and split

up the proceeds;" and informs him that if the man writes him, defendant, concerning this deal, that he had exhibit J for reference.

Exhibit K is a letter from Hart to defendant, dated March 13, 1911, which has no materiality here except as showing that they were working together with other parties.

Exhibit L is to the same purport, but indicates that the property being considered with another party is the northwest of 33, before referred to.

Exhibit M is a letter from Hart to defendant, indicating that he has quoted the two quarters which corner together, and among other things says that "I would expect to either split with you, or settle with you on the basis of \$400 cash on 29 and \$200 on 33, but would prefer if you could take the stock and settle with me;" and instructs defendant that, in case the man writes him, to handle the deal according to Hart's letter.

Exhibit N, dated March 13, 1911, is a letter from Hart to Crabbe, the customer with the stock, in which he informs Crabbe that he has concluded to quote him the land involved in this suit, and describes it, with the improvements, and the terms on which he will make exchange.

Exhibit O is a letter dated March 16, 1911, from defendant to Hart, instructing him, if possible, to close a deal with Crabbe, and that they could arrange the division (of commissions and profits) between themselves so it would be satisfactory.

On March 27, 1911, by exhibit P, defendant again writes Hart, inquiring how he is coming on with this deal, and informs him that he has seen a son-in-law of the woman who owns the land in 33, who says that the woman would probably take some stock for her rights in the land, so that would leave the cash to them.

On April 3, 1911, by exhibit Q, Hart writes defendant that he has been away and has just got home, and cannot say just what the outcome of their trades is, and informs defendant that he is now connected with the Northern Immigration Association of Fargo, and expects to do his business through them in the future.

Exhibit R is a letter to defendant from Hart, dated April 4, 1911, referring to the deal for this land with Crabbe, and informing defendant that Crabbe feels like looking the land over; refers to terms of exchange: "I thought you could get together and make a deal;" and tells

defendant, if he concludes a deal, to reserve Hart's regular commission of \$1.50 per acre.

Exhibit 3 is a letter, dated April 4, 1911, from Hart to defendant, calling his attention to the fact that he had notified him that he was now connected with the Northern Immigration Association of Fargo, and in the future to send all his correspondence in their care, that he had instructed them to open and read the same, and complete any deals that he has on, with defendant.

Exhibit T is dated April 4, 1911, and in it Hart informs defendant that if he makes a deal with the Fargo man he would be willing to take stock for their part of the commission, in case no cash could be obtained. He also informs defendant that the deal is up to him to do the best he can. That Crabbe would come if defendant should like him.

On April 5, 1911, by exhibit U, defendant writes Hart, acknowledging receipt of his letter, exhibit R, and stating that he is now with the Immigration Association, and that if the stock is first class he will make a trade on the terms specified in the correspondence. That if Crabbe came up there, and the defendant was not able to trade with him on this proposition, he would endeavor to make some kind of a deal, and "will pay you your commission on whatever deal I make." That he would do the best he could to close the deal, but that a few days later would be a better time for him to come on account of snow; and asking him to notify him ahead of when Crabbe would start.

Exhibit V is a letter from the Immigration Association, dated April 6, 1911, to defendant, acknowledging receipt of exhibit U, and informing him that they would try and get Crabbe started his way "as soon as the snow is off," etc.

In exhibit W, dated April 8, 1911, the association is informed by defendant that the snow is now practically gone; "send Crabbe up."

Exhibit X, dated April 13, 1911, informs defendant that the association had a talk with Crabbe the day before; that he expected to start for Stanley that week; and other matters with reference to prices, and that they were quite certain defendant could make a deal.

Exhibit Y is dated May 16, 1911, and is a letter from Hart to defendant, stating that on his return from Indiana he found the deal with Crabbe had been closed and a buggy left for him to dispose of; that he had sold the buggy for \$100, giving him credit for that amount

on commissions; also requesting him to take the matter up with the association at once.

Exhibit Z and exhibit 1 are letters written in June, from the association to the defendant, calling his attention to the fact that the balance of commissions had not been paid; that the account had been assigned to them; that the buggy had been credited at \$100, and requesting a remittance of the balance; also calling attention to the fact that he had not replied to their letters on the subject. No replies to these letters, relating to the payment of the commission, are found.

Exhibit 2 is a bill of sale from Crabbe to the defendant, of two mares, the buggy referred to, and three Jersey cows; the consideration named is \$1,125.

Exhibit 3 is a bill of sale from Crabbe to defendant, consideration \$1,000, of one brown stallion, Al Logan. Both are dated April 27, 1911.

Exhibit 7 is a deed from Elenora C. Kirkedalen, by George Eastwood, her attorney in fact, to Brabbe, of the northwest quarter of 33-157-92, dated and acknowledged April 27, 1911.

Exhibit 8 is a deed from defendant and wife to Crabbe, of the southeast quarter of 29-157-92, also acknowledged on the 27th of April, 1911.

Exhibit 9 is a bill of sale from Crabbe to George Eastwood, of one stallion, La Ponte, four Jersey cows, two training carts, and one set harness, of the same date, consideration \$1,150. The consideration named in each of Exhibits 7 and 8 is \$2,400.

Exhibit 10 is a bill of sale from Eastwood to the defendant, of four Jersey cows and the stallion La Ponte, and refers to agreements on the part of Eastwood with reference to certain lots in Stanley, and gives Eastwood the right to take possession of the personal property named if conditions are not complied with.

Exhibit 11 is a contract for a deed between defendant and wife to Eastwood, for the lots in Stanley referred to in exhibit 9.

The first assignment of error is that the evidence is insufficient to justify the verdict. Under this head it is contended that there is no evidence to show any contract wherein defendant contracted to pay any cash commission whatever. The evidence shows that the contract between the parties was for Hart to get customers in touch with defend-

ant; that if his doing so resulted in a sale a commission was to be paid. This commission was to be \$1.50 an acre, originally, subject to certain exceptions. And this without much reference to the completion of a contract on the exact terms which might have been first considered. Hart was to show customers to defendant, and in a very large measure leave it with defendant to jockey with the customers, and make any trade that was satisfactory to defendant, and, whatever trade was consummated, a commission was to be paid. True, correspondence shows that in some instances it might not be cash, but might be taken in trade as agreed upon; but in the trade which is the subject of this litigation the last word on the subject from the defendantis found in exhibit U, in which he wrote Hart, with reference to the deal with Crabbe: "If he comes here, and I am not able to trade with him on this proposition (*i. e.*, the terms theretofore mentioned), I will endeavor to make some kind of a deal, and will pay you your commission on whatever deal I make." The evidence is conclusive that, through the agency of Hart, Crabbe made the purchase of the two quarters in sections 29 and 33. The fact that the defendant eventually went to Fargo to close the deal with Crabbe is wholly immaterial. Exhibit U, from which we have made quotation, was in reply to Hart's letter to defendant, exhibit R, relating to this transaction. In exhibit R Hart had stated to defendant that if any deal was made with Crabbe, defendant should reserve for Hart his regular commission of \$1.50 per acre. Here was evidence of an accepted offer to take and give \$1.50 per acre, and was amply sufficient to sustain a verdict that the contract was for the payment of this sum in case defendant and Crabbe made a trade, which they did make. We are not dealing with a contract by which a broker undertakes to procure a purchaser on certain specified terms, and his failure to do so. The fact that correspondence previous to that contained in exhibits R and U had referred to making a division between themselves, and to a modification of conditions in case cash could not be obtained, was immaterial in the light of these two exhibits. This is also true as to conversations related between defendant and officers of plaintiff association, in which defendant suggested new terms as to commission, to which their assent was not given.

It seems to be urged that under a phrase in exhibit G, in which Hart had been informed that defendant was to get contracts and options and

show land, and do all that he could to effect sales, and Hart was to get purchasers there, and came with them if possible, and assist in closing deals, that because he did not assist in closing this deal he was not entitled to the commission. But it is evident from the record that the Immigration Association assisted defendant in closing this deal. It is true they may not have been present when the deal was finally consummated, but the phrase quoted does not mean that that should be necessary. It means, rather, that Hart should do whatever he was called upon to do, or found necessary after bringing the parties together, to aid in consummating the deal. Under this head it also seems to be urged that because Hart turned over the business before it was closed, to the Immigration Association no one was entitled to any commission. The exhibits disclose that defendant was duly informed of the fact of Hart's engagement with the association, and that they would conduct the business in his absence; that defendant made no objection to doing business through the association, continued his correspondence with it, accepted its services in lieu of those of Hart. He cannot now be heard to object that the services rendered were not received in lieu of those of Hart, or on his behalf, and with the same force, effect, and intention. Under the circumstances of this case, even though the deal was closed on terms differing from those first suggested by Hart or the association, defendant is not relieved of paying commissions. It was up to the defendant to either close the deal on any terms, or not to make a deal if he did not wish to pay commissions. The record discloses clearly that Crabbe went to Stanley to examine the property, and that defendant requested and urged his attendance at that place with a view to making any trade which he might deem advantageous to himself. But doing so, under these facts, he could not defeat the right to commissions.

It is also argued that something more must be done by a broker than to give the landowner the name of a prospective customer, and then to peacefully slumber or quit the deal until the landowner happens to make some deal with the prospective purchaser named by him. This all depends on the contract between the parties. If Hart did what he contracted to do to entitle him to the commission, and a deal was made, then the commission became due, and law applicable to con-

tracts of an entirely different nature has no bearing on the issues in this case.

It is next urged that there is no evidence that defendant sold or exchanged, or was interested in the sale or exchange of, the northwest quarter of section 33. On this question it is sufficient to say that it was one of the tracts contained in the list furnished by defendant to Hart, and for which defendant authorized Hart to negotiate a sale. It may not have belonged to the defendant, but that is an immaterial fact. And there is evidence in the record to indicate that the defendant may have studiously attempted to make the contract for this quarter in such a way as to defeat Hart's claim for commissions on its sale. At any rate, there is ample evidence to warrant the jury in finding that a commission was due Hart on its sale or exchange, notwithstanding the fact that defendant testified that he was not present when the transaction was had between Mrs. Kirkedalen and Crabbe, and that the only deal between himself and Crabbe related to the southeast quarter of section 29, and that all he had to do with the sale of land in section 33 to Crabbe was to introduce Eastwood to Crabbe. As stated, he had the land listed for sale. He listed it with Hart. Hart introduced Crabbe. Then, accepting defendant's own version, instead of consummating the sale himself, he introduced Eastwood and permitted him to consummate it, Eastwood being the attorney in fact for the owner of the tract. Again, an examination of the deeds and bills of sale throws considerable light on this transaction.

Error is assigned because the court received in evidence, over objection, exhibit 7, being the deed from Eleanor C. Kirkendalen to Crabbe, of the northwest quarter of 33. This deed was clearly admissible in evidence as a link in the chain of evidence, showing that the sale was consummated through the agency of Hart. It was not necessary that defendant should have owned the land that was sold. The evidence is sufficient to sustain a verdict that he had the sale of it, and that the sale was made through Hart, and by means of defendant bringing Eastwood, the attorney in fact of Kirkendalen, and Crabbe together, resulting in a consummation of the exchange.

The evidence as to the value of the buggy sold, and proceeds applied on the commission, is in conflict; hence, as to this also, the verdict must stand.

Assignments relating to the overruling of the motions for dismissal of the action, for a directed verdict, to strike out testimony and set aside the verdict, are all covered by what we have said under the subject of the insufficiency of the evidence, and therefore need not be separately noticed.

The order and judgment of the District Court are affirmed.

ABBIE A. HUGHES v. J. H. MAGORIS.

(147 N. W. 94.)

Laches — in bringing suit — circumstances in weighing testimony — cause of action — not barred by.

1. Under the circumstances of this case the laches of plaintiff in bringing his suit is a circumstance to be considered in weighing the testimony, but does not amount to a bar of his cause of action.

Evidence — Newman act — recovery.

2. Evidence examined under the Newman act, and found that plaintiff is entitled to the various sums mentioned in the opinion.

Opinion filed April 15, 1914.

Appeal from the District Court of Grand Forks County, *Templeton*, J.

Action for accounting.

Affirmed.

Geo. R. Robbins and *Geo. A. Bangs*, for appellant.

The plaintiff is guilty of laches in not bringing this case up for trial, and there is no justification or excuse for such failure. *Naddo v. Bardon*, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 618, 24 L. ed. 855, 858; *Washington v. Opie*, 145 U. S. 214, 36 L. ed. 680; *Patterson v. Hewitt*, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35.

Within the time fixed by the statute a court of equity will apply the doctrine of laches, and refuse relief upon equitable grounds, where plaintiff has slept on his rights, or where justice cannot be done de-

fendant. *Freeman v. Wood*, 14 N. D. 106, 103 N. W. 392; *Patterson v. Hewitt*, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90, 23 Pac. 908; *Hughes v. Kershow*, 42 Colo. 210, 15 L.R.A.(N.S.) 723, 93 N. W. 1116; *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Hagerman v. Bates*, 5 Colo. App. 391, 38 Pac. 1100; *Calhoun v. Millard*, 121 N. Y. 69, 8 L.R.A. 248, 24 N. E. 27; *Mason v. Sanford*, 137 N. Y. 497, 33 N. E. 546; *Boyer v. East*, 161 N. Y. 580, 76 Am. St. Rep. 290, 56 N. E. 114; *Bliss v. Prichard*, 67 Mo. 181; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; *Sheldon v. Rockwell*, 9 Wis. 181, 76 Am. Dec. 265; *Stevenson v. Boyd*, 153 Cal. 630, 19 L.R.A.(N.S.) 525, 96 Pac. 284; *Curtis v. Lakin*, 36 C. C. A. 222, 94 Fed. 251, 20 Mor. Min. Rep. 35.

Poverty is not an excuse for failure to exercise diligence in bringing suit to assert rights, or for failure to prosecute same. *Naddo v. Bardon*, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 618, 24 L. ed. 855, 858; *Washington v. Opie*, 145 U. S. 214, 36 L. ed. 680; *Patterson v. Hewitt*, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35; *Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392; *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Alsop v. Riker*, 155 U. S. 448, 460, 39 L. ed. 218, 222, 15 Sup. Ct. Rep. 162; *Hughes v. Kershow*, 42 Colo. 210, 15 L.R.A.(N.S.) 723, 93 Pac. 1116; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; *Stevenson v. Boyd*, 153 Cal. 630, 19 L.R.A.(N.S.) 525, 96 Pac. 284; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Chapman v. Bank of California*, 97 Cal. 155, 159, 31 Pac. 896; *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 987; *Bell v. Hudson*, 73 Cal. 287, 2 Am. St. Rep. 791, 14 Pac. 791.

Plaintiff must show good excuse for his delay. *Patterson v. Hewitt*, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35; *Naddo v. Bardon*, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 618, 24 L. ed. 855, 858; *Hagerman v. Bates*, 5 Colo. App. 391, 38 Pac. 1100; *Johnson v. Standard Min. Co.* 148 U. S. 360, 370, 37 L. ed. 480, 485, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554; *Willard v. Wood*, 164 U. S. 502, 525, 41 L. ed. 531, 540, 17 Sup. Ct. Rep. 176; *Hughes v. Kershow*, 42 Colo. 210, 15 L.R.A.(N.S.)

723, 93 Pac. 1116; *Continental Nat. Bank v. Heilman*, 30 C. C. A. 232, 58 U. S. App. 475, 86 Fed. 514; 16 Cyc. 163; *Segers v. Ayers*, 95 Ark. 178, 128 S. W. 1045; *Mackall v. Casilear*, 137 U. S. 556, 566, 34 L. ed. 776, 779, 11 Sup. Ct. Rep. 178; *Stuckey v. Lockard*, 87 Ark. 237, 112 S. W. 747; *Jackson v. Bechtold Printing & Book Mfg. Co.* 86 Ark. 591, 20 L.R.A.(N.S.) 454, 112 S. W. 161; *Carlock v. Carlock*, 249 Ill. 330, 94 N. E. 507; *Ten Broeck v. Jackson*, 71 N. J. Eq. 582, 69 Atl. 488; *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 53 Atl. 625; *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082; *Haffy v. Jenney*, 54 Mich. 511, 20 N. W. 563; *Benson v. Dempster*, 183 Ill. 297, 55 N. E. 651; *Dempster v. Rosehill Cemetery Co.* 206 Ill. 271, 68 N. E. 1070.

Laches, unless satisfactorily explained, will bar a recovery. *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 25 L. ed. 855; *Davidson v. Davis*, 125 U. S. 90, 31 L. ed. 635, 8 Sup. Ct. Rep. 825; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; *Brown v. Buena Vista County*, 95 U. S. 157, 161, 24 L. ed. 422, 423; *Richards v. Mackall*, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; *Cole v. Birmingham Union R. Co.* 143 Ala. 427, 39 So. 403; *Stevenson v. Boyd*, 153 Cal. 630, 19 L.R.A.(N.S.) 525, 96 Pac. 284; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082; *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277; *Horton v. Stegmyer*, 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134; *Graff v. Portland Town & Mineral Co.* 12 Colo. App. 106, 54 Pac. 854; *Hagerman v. Bates*, 5 Colo. App. 391, 38 Pac. 1100; *Bateman v. Reitler*, 19 Colo. 547, 36 Pac. 548; *Hall v. Nash*, 33 Colo. 500, 81 Pac. 249; *Woodruff v. Williams*, 35 Colo. 28, 5 L.R.A.(N.S.) 986, 85 Pac. 90; *Jones v. Bonanza Min. & Mill Co.* 32 Utah, 450, 91 Pac. 273; *Hoyt v. Pawtucket Inst. for Savings*, 110 Ill. 390; *Dobbins v. Wilson*, 107 Ill. 17; *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 987; 18 Am. & Eng. Enc. Law, 123; 1 Cyc. 430, 431; *Smith v. Emery*, 106 Me. 258, 76 Atl. 686; *Glenwood Mfg. Co. v. Syme*, 109 Wis. 355, 85 N. W. 432; *International Silver Co. v. William H. Rogers Corp.* 66 N. J. Eq. 140, 57 Atl. 725; *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Tozier v. Brown*, 202 Pa. 359, 51 Atl. 998; *McKnight v. Taylor*, 1 How. 161, 11 L. ed. 86; *Rives v. Morris*, 108 Ala. 527, 18 So. 743; *Adams v. Taylor*, 14

Ark. 62; Groenendyke v. Coffeen, 109 Ill. 325; Curtis v. Lakin, 35 C. C. A. 222, 94 Fed. 251, 20 Mor. Min. Rep. 35; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258; Hume v. Beale (Crosby v. Beale) 17 Wall. 350, 21 L. ed. 605; Patterson v. Hewitt, 11 N. M. 1, 55 L.R.A. 658, 66 Pac. 552; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873.

Laches need not be pleaded. The right of recovery is barred if the complaint and testimony do not excuse the delay. 12 Enc. Pl. & Pr. 829; 13 Enc. Pl. & Pr. 183; Freeman v. Wood, 14 N. D. 106, 103 N. W. 392; Sullivan v. Portland & K. R. Co. 94 U. S. 806, 811, 24 L. ed. 324, 326; Richards v. Mackall, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; Stevenson v. Smith, 189 Mo. 447, 88 S. W. 86; Schmitt v. Hagar, 88 Minn. 413, 93 N. W. 110; Wagner v. Sanders, 62 S. C. 73, 39 S. E. 950; Taylor v. Slater, 21 R. I. 104, 41 Atl. 1001; Chase v. Chase, 20 R. I. 202, 37 Atl. 804; Evans v. Woolsworth, 213 Ill. 404, 72 N. E. 1082; Coon v. Seymour, 71 Wis. 340, 37 N. W. 243; Hagerman v. Bates, 24 Colo. 71, 49 Pac. 139; Harris v. Hillegass, 66 Cal. 79, 4 Pac. 987; Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896; Bell v. Hudson, 73 Cal. 289, 2 Am. St. Rep. 791, 14 Pac. 791.

Stephen J. Cowley, for respondent.

Where laches or staleness of a demand is relied on, it must be taken advantage of in the court below. Humphreys v. Butler, 51 Ark. 351, 11 S. W. 479; Walker v. Denison, 86 Ill. 142; Emmons v. Oldham, 12 Tex. 18; State v. Holloway, 8 Blackf. 45; Randolph v. Knox County, 114 Mo. 142, 21 S. W. 592; Duncan v. New York Mut. Ins. Co. 138 N. Y. 88, 20 L.R.A. 386, 33 N. E. 730; Wills v. Dunn, 5 Gratt. 384; Douglass v. Ferris, 138 N. Y. 192, 34 Am. St. Rep. 435, 33 N. E. 1041.

When relied upon as a defense, it must be pleaded. Hill v. Barner, 96 Pac. (Cal.) 111.

It should also be claimed and set up in the court below. Henshaw v. State Bank, 239 Ill. 515, 130 Am. St. Rep. 241, 88 N. E. 214; Zeigler v. Hughes, 55 Ill. 288; Spalding v. Macomb & W. I. R. Co. 225 Ill. 585, 80 N. E. 327; Schnell v. Rock Island, 232 Ill. 89, 14 L.R.A.(N.S.) 874, 83 N. E. 462; Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864; Trustees of Schools v. Wright, 12 Ill. 432; O'Halloran

v. Fitzgerald, 71 Ill. 53; Darst v. Murphy, 119 Ill. 343, 9 N. E. 887; Dawson v. Vickery, 150 Ill. 398, 37 N. E. 910.

The only exception to these rules is where the complaint or bill undertakes to account for or explain the delay in bringing suit. Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864.

Laches is a matter of defense. Murto v. Lemon, 19 Colo. App. 314, 75 Pac. 160.

In equity, a claim not urged on trial cannot be raised on appeal. Ketchell v. Keene, 171 Mich. 108, 136 N. W. 1121; Gable v. Cedar Rapids, 150 Iowa, 108, 129 N. W. 737.

The supreme court will not consider an objection not urged in the court below. Ditton v. Purcell, 21 N. D. 648, 36 L.R.A.(N.S.) 149, 132 N. W. 347; International Text-Book Co. v. Marvin, 166 Mich. 660, 132 N. W. 437.

Laches and estoppel constitute affirmative defenses, and must be pleaded and the facts proved. McDermott v. Anaheim Union Water Co. 124 Cal. 112, 56 Pac. 779; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; 12 Enc. Pl. & Pr. 831; Jones v. The Richmond, Fed. Cas. No. 7,492; The Platina, 3 Ware, 180, Fed. Cas. No. 11,210; Green v. Terwilliger, 56 Fed. 384.

After judgment on issues on account, it is too late for losing party to set up defense of staleness. Roemmich v. Wamsganz, 8 Mo. App. 576; 12 Enc. Pl. & Pr. 833.

The higher court is restricted to hearing of such issues only as where raised in lower court. Cooper v. Armstrong, 3 Kan. 78; Re Campau, 48 Mich. 236, 12 N. W. 217; Fuller v. Schroeder, 20 Neb. 631, 31 N. W. 109; Trimmer v. Adams, 18 N. J. Eq. 505; Hinman v. Stillwell, 34 Hun, 178; Kilgore v. Emmitt, 33 Ohio St. 410.

On appeal in equity cases, the parties are confined to the pleadings and the evidence in the lower court. Pacific R. Co. v. Ketchum (Pacific R. Co. v. Missouri P. R. Co.) 95 U. S. 1, 24 L. ed. 347; Bloodgood v. Clark, 4 Paige, 574; Morris v. Richardson, 11 Humph. 389; Van Zile, Eq. Pl. & Pr. 496; Blease v. Garlington, 92 U. S. 1, 23 L. ed. 521; Studwell v. Palmer, 6 Paige, 57; Hill v. Bourkhard, 5 Colo. App. 58, 36 Pac. 1115; Shelton v. Franklin, 224 Mo. 342, 135 Am. St. Rep. 537, 123 S. W. 1084; O'Reilly v. Campbell, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421; Sweeney v. Great Falls & C. R.

Co. 11 Mont. 523, 29 Pac. 15; Holden v. Clark, 16 Kan. 346; Hill v. Barner, 8 Cal. App. 58, 96 Pac. 111; Helm v. Brewster, 42 Colo. 25, 93 Pac. 1101; Mortgage Trust Co. v. Elliott, 36 Colo. 238, 84 Pac. 980; Henshaw v. State Bank, 239 Ill. 515, 130 Am. St. Rep. 241, 88 N. E. 214; Duncan v. New York Mut. Ins. Co. 138 N. Y. 88, 20 L.R.A. 386, 33 N. E. 730; Grant v. Powers Dry Goods Co. 23 S. D. 195, 121 N. W. 95; Emmons v. Oldham, 12 Tex. 18; Wilder v. Wilder, 82 Vt. 123, 72 Atl. 203.

Laches, unlike limitation, does not depend upon time, but principally upon the inequity of permitting the claim to be enforced, some inequity on account of the changed condition of the parties, or their property—something that works a disadvantage to another. Shearer v. Hutterische Bruder Gemeinde, 28 S. D. 509, 134 N. W. 63.

But, where the party interposing this defense has caused or contributed to the delay, he cannot take advantage of it. Northern P. R. Co. v. Boyd, 101 C. C. A. 18, 177 Fed. 804; Thorndike v. Thorndike, 142 Ill. 450, 21 L.R.A. 71, 34 Am. St. Rep. 90, 32 N. E. 510.

There must be full knowledge of all the facts, and full freedom to act. Stephens v. Dubois, 31 R. I. 138, 140 Am. St. Rep. 741, 76 Atl. 656; Evans v. Moore, 247 Ill. 60, 139 Am. St. Rep. 302, 93 N. E. 118.

Laches will not be imputed to a person while under a disability. Melms v. Pabst Brewing Co. 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518.

The doctrine of laches does not apply to an action brought before it is barred by the statute of limitation. Johnson v. Toulmin, 18 Ala. 50, 52 Am. Dec. 212; Hamilton v. Hamilton, 18 Pa. 20, 55 Am. Dec. 585; Smilie v. Biffle, 2 Pa. St. 52, 44 Am. Dec. 156; Haynie v. Hall, 5 Humph. 290, 42 Am. Dec. 427; Tarleton v. Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296; Bank of Tennessee v. Hill, 10 Humph. 176, 51 Am. Dec. 698; Perkins v. Cartmell, 4 Harr. (Del.) 270, 42 Am. Dec. 753; Switzer v. Noffsinger, 82 Va. 518; Hutcheson v. Grubbs, 80 Va. 251; McCarthy v. Ball, 82 Va. 872, 1 S. E. 189.

Equitable relief will not be refused where the delay is not sufficient to bar the legal remedy. Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864; McDermont v. Anaheim Union Water Co. 124 Cal. 112, 56 Pac. 779; Platt v. Platt, 58 N. Y. 648; Michigan Trust Co. v. Red Cloud, 3 Neb. (Unof.) 722, 92 N. W. 900; Wells v. Western U. Teleg. Co.

144 Iowa, 605, 24 L.R.A.(N.S.) 1045, 138 Am. St. Rep. 317, 123 N. W. 371; Wilson v. Plutus Min. Co. 98 C. C. A. 189, 174 Fed. 317; Broatch v. Boysen, 99 C. C. A. 278, 175 Fed. 702.

The plaintiff was not guilty of laches in bringing this action. Fisher v. McNulty, 30 W. Va. 186, 3 S. E. 593; Underwood v. Wakefield, 27 S. D. 397, 131 N. W. 399.

BURKE, J. Plaintiff brings this action for an accounting from his tenant of a farm for the years 1901, 1902. The abstract contains something over 300 pages; and she appeals under § 7229, Rev. Codes 1905, whereby a trial anew is sought in this court. No public question is involved, and our duties consist principally in reading the evidence and weighing the same after the manner of a jury. No useful purpose can be served by setting forth this testimony, and we will content ourselves with announcing the result of our deliberations upon fact, and deciding the questions of law involved.

(1) The defendant contends that plaintiff is guilty of laches in bringing the action, to such an extent that he should be precluded from any recovery. The crops raised in 1901 and 1902 are in dispute, and the action was not commenced until the year 1908. It is not claimed that the statute of limitations has run, but defendant insists that during the intervening years he has lost or destroyed his books of account relating to this transaction; that the elevator books showing the receipt of the grain have been likewise lost or destroyed by the elevator company, and that his witnesses, who were mostly farm hands, have moved away from the vicinity, and he has been unable to locate them; that had the plaintiff promptly prosecuted his cause of action, the defendant would have been in better shape to have presented his defense. The delay of the plaintiff can be excused partly because of age and infirmities, and partly on account of poverty. Without setting out the testimony upon this point, we conclude that in this case laches of the plaintiff is not sufficient to preclude a recovery, but the circumstances should all be considered in weighing the testimony. For example, the failure of the defendant to produce his books will not be considered a circumstance against him, as it might be, had the trial occurred shortly after the threshing was done.

(2) The first item in dispute relates to the flax crop for the year 1901. The plaintiff is a married woman living with her husband in

the city of Larimore. The couple are something over seventy years of age, and the husband transacted all of the business for the wife. He testifies that he kept books, and produced in court a ledger in which he had written down memoranda of the transactions in dispute. He testifies that he furnished flax seed for 134 acres in 1901, and examined the crop while it was growing, and estimated the yield at 22 bushels per acre; that the flax was grown upon breaking, and was clean. He further testifies that during threshing time he visited the farm, and had a conversation with defendant, who told him that he had threshed 900 bushels with his own machine, and had broken down, and hired another machine to finish the flax; that after the flax was all threshed he went to defendant and asked him for a statement, and was told by the defendant to see one Savage, his foreman, who could tell him all about it; that he had gone to Savage, who had taken a lantern and looked at his book, and showed him thereon that the last machine had threshed 1,473 bushels, making a total of 2,373 bushels, of which he was entitled to one half, less the expense of threshing.

The defendant upon his part insists that the crop raised was much smaller, and that a settlement in full had been had for that year. Each party is corroborated by some circumstances and by some witnesses, and we are agreed that the plaintiff has, by a fair preponderance of the evidence, established his contention, and that the trial court correctly estimated the amount owing from the defendant to the plaintiff upon this cause of action, which was to the effect that there was due to the plaintiff $639\frac{1}{2}$ bushels, of flax of the value of \$1.30 per bushel, for the year 1901, together with interest thereon at 7 per cent since Feb. 1-1903.

The next item of dispute relates to hay raised upon contract during the same year, and we have reached the conclusion that the trial court is correct, which we merely announce without setting forth the evidence.

Upon the question of the 1902 crop, there is likewise a dispute, and claim of the defendant that the same has been settled in full. Upon this point we find, with the trial court, that there is due to the plaintiff upon accounting the value of 325 bushels of flax at 75 cents per bushel, and 240 bushels of wheat at 70 cents per bushel, with interest upon all of such sums at 7 per cent since February 1, 1903.

It follows that the judgment of the District Court is in all things affirmed.

R. N. ROSS v. THE CITY OF KENMARE.

(146 N. W. 897.)

Judgment — notice of entry — appeal — restriction — practice.

1. Following *Keogh v. Snow*, 9 N. D. 458, *held*, that one who seeks by the service of notice of entry of judgment to restrict or limit the time for taking an appeal will be held to strict and technical exactness of practice.

Rule — service of notice by mail — address — insufficient — must be on attorney of record.

2. It is not a compliance with such rule to send such notice by mail addressed merely to "The City Attorney, Kenmare, N. Dak.,"—especially where it appears that the defendant city at the time had no city attorney; and it also appearing that the attorney of record for defendant had resigned as city attorney, and had transferred his residence from Kenmare to Minot long prior to the date of such attempted service. Proper practice required that the service of such notice be made upon the attorney of record in the action.

Opinion filed April 22, 1914.

Motion to dismiss appeal upon the alleged ground that such appeal was taken after the expiration of one year from the date of service of the notice of entry of judgment.

Motion denied.

Palda, Aaker & Greene, Minot, N. D., for the motion.

A. W. Gray, Kenmare, N. D., *contra*.

Fisk, J. Respondent moves to dismiss the appeal herein upon the ground that notice thereof was served more than one year after notice of the entry of the judgment was given.

Sec. 7204, Rev. Codes 1905 provides: "An appeal from a judgment may be taken within one year after written notice of the entry thereof, in case the party against whom it is entered has appeared in the action." The judgment was entered on August 7, 1912, and on August 9th notice of the entry thereof was mailed in an envelop addressed "City Attorney, Kenmare, North Dakota." The sole question for determination is whether such service of the notice of entry of judg-

ment was a sufficient compliance with the statute to start the running of the period allowed for appeal.

The record discloses that G. S. Woledge signed the answer as attorney for defendant, and the order for judgment and the judgment recite that Murphy & Woledge appeared as defendant's attorneys at the trial of the action, which took place in December, 1910. Affidavits on the part of appellant were presented showing that G. S. Woledge qualified as city attorney of Kenmare on May 2, 1910, and acted as such until December 4, 1911; and on the latter date one P. M. Clark was appointed to such office, and served until July 1, 1912, at which time he resigned; and that there was a vacancy in such office from the latter date until December 2, 1912, during which time there was no one acting as city attorney for the defendant city. It is also shown by affidavits that Woledge removed from the city of Kenmare to the city of Minot prior to January 1, 1912, where he has since resided. It is also stated in such affidavits, upon information and belief, that there never has been any notice of entry of judgment served upon the said Woledge in said action; nor does respondent's counsel contend to the contrary, but they rely solely upon the service by mail as above stated.

We are agreed from the showing thus made that the motion to dismiss should be denied. It is not contended that the notice of the entry of such judgment ever in fact came to the knowledge of the defendant city. The rule is well settled, as stated in 2 Cyc. 799, that "one who seeks, by the service of notice, . . . to restrict or limit the time in which an appeal may be taken, will be held to strict and technical exactness of practice,"—citing numerous authorities. See also, to the same effect, *Keogh v. Snow*, 9 N. D. 458, 83 N. W. 864. It can hardly be said that the service in this case conformed to strict and technical exactness of practice. It is doubtful, indeed, if such service constituted even a substantial compliance with the statute. It was not addressed to G. S. Woledge, nor to Murphy & Woledge, the attorneys of record in the action. Sec. 7333, Rev. Codes provides: "In case of service by mail the paper must be deposited in the post office, addressed *to the person* on whom it is to be served at his place of residence, and the postage paid." Addressing merely the city attorney is not a strict compliance with such statute. While respondent might have the right to presume that the city of Kenmare had such an official, we do not think

he had the right, as against this defendant, to shift the duty and responsibility upon the postmaster, of determining the identity of such official. And where, as disclosed on this motion, there was in fact no one holding such office at the time, we cannot presume that the envelope containing the notice ever came to the knowledge of the defendant.

We might mention the further fact, as disclosed by this record, that defendant's attorney of record was, and for a considerable time had been, residing in the city of Minot, where plaintiff's counsel resided, at the time of the attempted service of the notice, and service by mail upon such attorney could not therefore be made under § 7332, Rev. Codes. Clearly, plaintiff was at least authorized, if not required, to make service of the notice upon Woolledge.

In support of our views see *Parker v. Williamsburgh*, 13 How. Pr. 250, a case very similar on the facts to the case at bar.

Motion denied.

EMMA C. SCHINZER v. JOHN WYMAN.

(146 N. W. 898.)

Contract — power to cancel — court of equity — exercised only in clear case — fraud.

1. The power to cancel a contract will not be exercised by a court of equity, except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear.

Evidence — fraud — undue influence — failure to show.

2. Evidence examined and *held*, neither to show fraud nor the use of undue influence.

Opinion filed March 25, 1914. Rehearing denied April 22, 1914.

Appeal from the District Court of Cass County, *Pollock, J.*

Action to have declared null and void and to set aside two war-

Note.—On the question of the jurisdiction of equity to cancel instrument on the ground of fraud, see note in 5 L.R.A.(N.S.) 1036.

ranty deeds, a contract for a deed, and a certain receipt relating to said transaction, and for a personal judgment for the amount of certain mortgages placed by the defendant upon the land in controversy. Judgment for plaintiff.

Reversed.

Statement by BRUCE, J.

This is an action to have declared null and void and to set aside two warranty deeds, a contract for a deed, and a certain receipt relating to said transaction, and for a personal judgment for the amount of certain mortgages placed upon the land in controversy. Judgment was rendered by the trial court in favor of the plaintiff, from which the defendant appeals and asks for a trial *de novo*.

The gist of the plaintiff's amended complaint is that the plaintiff was a German, and unable to read or write the English language and to understand the English language except with great difficulty; was illiterate, and an ignorant woman of weak understanding and ignorant of business affairs, and had no understanding of legal documents, and was a person easily influenced, all of which facts were well known to the defendant; that the plaintiff had known defendant for a period of about a year and a half, and that in the summer of 1910 she purchased from said defendant at defendant's solicitation a tract of land known as the Argusville farm; that shortly after defendant's acquaintance with plaintiff, and about the time of said purchase and ever since, the defendant had counseled and advised the plaintiff in her business affairs and acted as her agent in various transactions; that the relations between them during all of said time had been those of intimate friendship, and that the plaintiff during all of said times had implicit confidence in the defendant, and was easily influenced by him, which facts were well known by the defendant; that the plaintiff came to Fargo on the 5th day of June, 1911, at the solicitation of the defendant; that during her stay in the city she was made the guest of the defendant and his family, and that the relations between them appeared to her to be of a most friendly and cordial nature; that during such stay the defendant took her about the county, and showed her a certain tract of land known as the Barry farm, and tried to induce her to buy it, more particularly on the 11th day of said month, when "the defendant tried

to persuade and counsel the plaintiff herein until the late hours of the night, trying to induce the plaintiff to purchase the said premises; that the plaintiff herein informed the said defendant that she was unable to purchase the same, and refused so to do;" that the defendant told her that her lands in Cass county, the Argusville farm, could be sold for \$59 an acre cash, and her Minnesota lands, the Glyndon farm, for \$55 an acre cash, and urged the plaintiff to authorize him to sell such lands at said prices, and requested the plaintiff to reduce to writing the authority authorizing the defendant to sell the said premises at said prices, to which she consented; that thereafter and prior to 9 o'clock and 30 minutes in the forenoon of the 12th day of June, 1911, the defendant requested the plaintiff to call at his office, saying that he would prepare for plaintiff's signature contracts authorizing defendant to act as plaintiff's agent in selling plaintiff's said premises at said prices in cash; that pursuant to said request plaintiff arranged to call at defendant's office, but before reaching the office was taken ill and was suffering considerable pain in body and mind; and that the defendant met said plaintiff in her said condition, and knew of her said illness and condition, and brought said plaintiff to his office; and that the plaintiff then and there notified said defendant that she intended to take the train at Fargo at 9:30 o'clock in the forenoon of said day, and that plaintiff, in addition to the suffering in body and mind from the said illness, and knowing that she had but a few minutes to take said train, and her attention being concentrated in arranging to take said train, she was unable to fix her attention upon and understand the effect of legal documents when described to her, all of which facts were well known to the defendant; that knowingly taking advantage of plaintiff's age, residence, condition, her inability to read or write the English language and understand the same except with great difficulty, and the fact that she was illiterate and an ignorant woman of weak understanding and ignorant of business affairs, and that she had no understanding of legal documents, and that she was a person easily influenced, and knowing the implicit confidence plaintiff had in defendant, and knowing that plaintiff was suffering in body and mind from said illness, and that plaintiff was about, in a few minutes, to take said train at Fargo for her home in Illinois, and knowing that plaintiff's attention was concentrated in arranging to take said train within a few minutes

thereafter, and knowing that plaintiff was unable to fix her attention upon and understand the effect of legal documents, and that plaintiff was a person easily influenced, especially by the defendant, said defendant thereafter and before the leaving of said train on said 12th day of June, 1911, taking advantage of plaintiff's said above condition and circumstances and the relations existing between the plaintiff and the defendant, *knowingly, falsely and fraudulently presented and handed to the plaintiff for her signature certain papers, and knowingly, falsely, and fraudulently represented to said plaintiff that each and all of said papers were originals and copies of papers appointing the same defendant agent of the plaintiff to sell and dispose of plaintiff's said lands (the Glyndon and Argusville tracts), for the respective prices in cash hereinbefore mentioned; that plaintiff being unable to read or write the English language and understand the same except with great difficulty, and being illiterate and an ignorant woman of weak understanding and ignorant of business affairs, and having no understanding of legal documents, and having implicit confidence in defendant, and on account of the relations existing between the plaintiff and defendant, and suffering in body and mind from her said illness and arranging to take said train at Fargo for her home in Illinois, and being unable to fix her attention upon and understand the effect of legal documents, and being easily influenced by the defendant, and relying upon said representations of the defendant, and believing them to be true, and having no knowledge of the falsity of the same, plaintiff signed each and all of said papers presented to her by defendant for her signature—the said papers actually signed being deeds to Wyman of the said Argusville and Glyndon tracts, and a contract for purchase of said Barry farm.*

According to our construction of the evidence in the case the defendant, John Wyman, was fifty years of age and a shrewd business man with large experience. The plaintiff had been born in and was a resident of the state of Illinois, and had been a widow for about twelve years. She was about forty-seven years of age and could speak and write English fairly well, though she was more at home in her native tongue. She had no understanding of the technical terms of legal documents. She in the main relied in business matters upon advisers, particularly her local bankers, but seems to have been able to write intelligent business letters. She seems to have been confiding in her

nature, and a person who was easily influenced. At the death of her husband she was left in the possession of some 225 acres of land and personal property. Her exact title to this land is not shown. The land was encumbered with mortgages to the extent of about \$7,000. During the twelve years intervening between the death of her husband and the trial, she seems to have been able with the help of her boy, now fifteen years of age, and the advice of the local bankers, to have so successfully conducted the working of her land that she was able to pay off the encumbrances, and to buy a farm in North Dakota known as the Argusville farm, containing 320 acres, and what is known as the Glyndon farm, in Minnesota, which contained 185 acres. This last farm was purchased about eight years before the trial, and plaintiff appears to have visited it twice, and to have had the same looked after at first by neighbors and then by the banker at Glyndon, most of the correspondence with the "neighbors" and the Glyndon banker seeming to have been carried on by the plaintiff herself. At various times contracts appear to have been made in duplicate, which she signed and returned to Minnesota. The defendant and plaintiff first met in 1910. Defendant had a local agent in Ashton named Phillip Brown. In that year Brown brought a number of people from Ashton to look at lands. The plaintiff accompanied this party, and at that time examined various tracts, among them what is known as the Argusville farm. She did not buy at that time. Defendant Wyman seems to have seen her on this trip for the first time, and some ten days later went down to Illinois, and consummated the sale of what is called the Argusville farm. The purchase was made as a speculation, the plaintiff having made out of her Glyndon farm investment a higher rate of interest on the whole than she could have earned at the local banks, and perhaps being encouraged by that fact to make the purchase. At the time of the sale defendant leased the Argusville tract from her for the year 1911, agreeing to pay a cash rental of \$4 per acre. The deal was consummated through the Ashton bank. Following this sale the defendant visited the plaintiff at Ashton, Illinois, three or four times, he evidently having agents and customers in that locality. On all of such occasions he visited her at her home, and seems to have asked that he might handle her business for her, and at any rate induced her to sign three notes for an aggregate of about \$13,000 as an accommodation indorser, stating

that in North Dakota interest was so high that poor people could not do anything. For this accommodation, which allowed him to discount the notes in Illinois at a lower rate than he could have done in North Dakota, he paid her about \$460. He told her that "it was cheaper for him to get money that way than to borrow here." Later, and on October 21st, 1910, he wrote her in regard to the notes, and on October 5th wrote as follows:

Dear Mrs. Schinzer:—

I dictated short business letter to you other day. I intended write you myself, but I did not have time. First of all I thank you very much for your business, and also courteous way you have treated me, and helped me to get money on August Griese notes. I wish you could come up here and spend few days, and enjoy some sociable life. I am sure you would like Fargo and our people here very much, and would also like your farm more now, because we had rains up here, so all grain on that farm is looking fine. I am coming to Iowa and Illinois perhaps some time during next week, and if can spare time I will call on you again, and will explain to you how you can make from 2 to 4 per cent, and perhaps great deal more on some money, that being loaned in your part of country at rate of $4\frac{1}{2}$ to 5 per cent. I enjoyed time very much I spent at your home, and will be very glad return compliments in some substantial way to show you that your kindness is highly appreciated. Will be glad to hear from you again before I start on my trip.

On October 10th he again wrote her that he was sorry she was having bad luck with her Minnesota farm, and that sometime when she came up he would make arrangements to look after it, or sell it and get her a more desirable farm; also that he expected to be in Illinois last of that week and would call on her. He also stated that he often wished that she was in North Dakota to take auto rides with him to see her farm and others. Again on May 3, 1911, he wrote her, asking at just what time she was going to come up and stay with him a couple of weeks, and to let her boy come up with her, and to let him know how soon school would be out so that her boy could come. On the 26th of May, 1911, he wrote her that she should not be afraid to come alone, and gave her directions how to reach Fargo. He told her that if he was

not at home she would be taken care of, that Mrs. Wyman would take care of her just as well as if she had known her for twenty years. He added, "I want you to be sure and come up, and then later as we can agree you can have your boy sent up. I want you to see your farm that I sold you. Further I want you to come next week, because that is a big celebration here that will start next Monday, and the 5th day of June, and last three days, and the remainder of the week. . . . Prepare yourself to stay here at least a week, as you will have a good time. Rest up a bit, and I want to talk to you confidentially on some business matters." It appears that previous to this last letter, and during one of the conversations that he had with the plaintiff at her home in Illinois, he told her that he wanted her to come up to Fargo and go into business with him. She said he wanted to show her how to make money, and make at least from 10, 15 to 20 per cent, where she did not make but 3 or 4 at home. It appears to us, indeed, to be quite clear that the defendant's main purpose in inviting the plaintiff to visit him in North Dakota was to induce her to go into the real estate business with him. In some of these conversations also, he told her that she should trust her business to him. She testified that he asked her as often as he saw her, and that she said that she was willing, and that she had confidence in him when she said it. There is in the record, however, no real evidence of the actual creation of any agency or trust relationship. She said that when she signed one of the notes as an indorser she told him that she knew she "had ought not to done it, but she couldn't help to do what he told her, and that he would smile at her," and that this was before June 12th, 1911. The plaintiff claims that at this time the defendant was looking after the Argusville farm for her. When plaintiff arrived in Fargo in the first week in June, 1911, the defendant was not at his office, but a young man took her to the defendant's home, and that evening the defendant took the plaintiff and his wife and baby out for an automobile ride. Later on he took her for another ride, and while riding would say, "here is a piece for sale for so much and so much," and that the plaintiff should tell her friends when she got home. He did not show her any land in particular on that day, nor did he say anything in particular about selling her Argusville and Glyndon farms. Two days later the defendant took the plaintiff again, she saying that she had a settlement to make relative to her

Glyndon farm, and he saying that he would take her over there and help her look at it. A little later the defendant, his wife and daughter and the plaintiff, went to look at what is called the Barry farm, the contract for the purchase of which is sought to be aside in this action. On this trip he told her that he wanted her to take particular notice of the two sections, that he wanted her to have them, wanted her to look at the buildings and such like, and she told him that she could not handle it, and he said he would handle it for her, and they looked it over and returned to Mr. Wyman's home. She said that she did not want to look at the land, and told the defendant so. Nothing further was said that day relative to the Barry farm, but the defendant took plaintiff, his wife and daughter, a second time, and said that he wanted her to have that farm, and she told him that she did not think it was any use for her looking at it because she could not handle it. She said that he wanted her to sell her Illinois land and the others, and come to Fargo and buy the Barry farm, and she informed him that she could not sell the Illinois farm, it was not hers, and he informed her that he could swing it without that. Some of these conversations, it appears, were held between the plaintiff and the defendant at defendant's house when they were alone, and at dusk after supper time. On the last Sunday night it appears that the defendant, being with her alone, offered her some beer, himself drank some, and had her drink about half a glass. This was late at night and after Mrs. Wyman had retired. He then asked her to buy the Barry farm, and told her that she might sell the Argusville and the Glyndon farms with the crop, and that the said lands with the advance upon them and the crops ought to be worth \$80 an acre. She said that the conversation that evening influenced her, and that it was difficult for her to resist anything that he asked her to do, and she could not say no to what he asked her. She had previously told him that she wanted to go home on the day before, but he did not want her to go. On the following Monday morning he told her she should get ready and come down to his office and sign some papers. He took her, at her request, to a doctor's office in an automobile to have her foot treated for a corn or a similar growth. There she had a small operation performed during which she fainted. She testifies that she told him that she had fainted, but she did not remember that he said anything. She also testified that she told him she was not feeling well. It was about the

middle of the afternoon when he took her to his office. She testified that she had figured on going home, but that the doctor had informed her that she had to stay and take another treatment. When she arrived at the defendant's office he laid the papers there for her to sign. According to her report of the transaction there was not much conversation. He simply got the papers out and told her where to sign them. She signed only two papers, and she signed them because Wyman told her to, and it was because she had confidence in him and believed everything he said. He read part of one paper to her, but she did not know what that part was. He did not finish any papers, and she thought the part he read meant how much the farm should sell for. She says she signed only two papers, and the defendant told her one was for her and one for him. She said she did not think she signed more than two, but said that she did not think that she would know the papers if she saw them. The papers appear to have been a warranty deed of the Argusville farm to Wyman, a warranty deed of the Glyndon farm to Wyman, and a contract for the Barry farm between the plaintiff and the defendant. Upon the trial these documents were shown to the plaintiff, and she said that she did not know what they were, and did not know which one she signed. She testified that she signed only two papers, but she could not pick out the one that she signed, and did not know what she was signing; that he did not tell her exactly what they were; that he simply got the papers and told her where she should sign them; that she signed them because he told her to; that she believed everything he said; that he read part of one of the papers, but she did not know what part. She said she thought that it meant how much that farm should sell for, what the price of the other farm (the Barry farm) was. She said that she did not know that she was selling the Argusville farm and the Glyndon farm to the defendant, and that she did not remember that Mr. Wyman told her that she was; that he gave her no money or consideration for signing them at the time; that he took her to another man. She did not remember whether either of them spoke to her. Both of the deeds, however, appear to have been signed and delivered in the presence of two witnesses, E. A. Engebretson and B. J. Miller, and to have been acknowledged by the plaintiff before the said Engebretson as a notary public. Under the same date there appears to have been executed an agreement or receipt bearing the signature and indorse-

ment, "Agreed to, Emma C. Schinzer," in which the defendant acknowledged the receipt of the warranty deeds for the two farms in question, and which stated that the same were to be sold by the said defendant on or before March 1, 1912, and that all the proceeds realized from said sales were to be applied on and as part payment of the purchase price of the so-called Barry farm, "this day purchased by the said Emma C. Schinzer, of Ashton, Ill., from the said John Wyman of Fargo, N. Dak." The agreement also provided that the rental of the said farm for the year 1911 was to be applied on such purchase. On the same day there also appears to have been executed a contract for deed from the said defendant to the said plaintiff for the said Barry farm, conditioned upon the payment by the said plaintiff of the sum of \$74,999 on or before the 1st day of March, 1912, and the payment of \$1 at or before the execution of the contract, and which provided that the said plaintiff should have immediate possession of the land, and that the proceeds of one half of all the crop except the corn should be applied on the purchase price. The said contract, though signed by the said Wyman and the said Emma C. Schinzer, does not appear to have been either witnessed, acknowledged, or recorded, nor is there any acknowledgment of proof of the payment of the \$1; in fact, the evidence shows that the same was not paid. These papers do not appear to have been given to the plaintiff until she had left the train at Rochelle, Illinois, on her way home, having been accompanied to that point by the defendant, who was on his way to close his deal with Barrie at Bloomington, Illinois. The defendant, however, testified that the papers were kept by him until such time at the plaintiff's request. When handed to her, she testified, he told her that they should be put in her suitcase, and that she should be careful not to lose them, as they were valuable, though he did not tell her what they were. She testified that after she was home for some time a friend of hers, her doctor, saw them and told her that she should show them to a lawyer. This she did, and was advised to take steps toward undoing what she had done. This attorney seems to have been employed, and to have gone to North Dakota and in turn to have employed A. C. Lacy, Esq., of Fargo, North Dakota, to represent the plaintiff, who on the 30th day of June, 1911, had a cancellation of instrument prepared, which was served on the defendant on the 3d day of July, 1911, on which date the present action was commenced and a

notice of *lis pendens* filed. It appears also from the evidence that the said defendant, immediately after the execution and delivery to him of the deeds aforesaid, and on the 12th day of June, 1911, and evidently without the knowledge of the plaintiff, procured a loan of \$6,000 from the Northern Trust Company, and secured the same by a mortgage upon the said east half of section 12, township 114 north of range 50, in Cass county, North Dakota, being the Argusville farm, which said mortgage was not paid or satisfied until the 24th day of June, 1911, and on the 22d day of June, 1911, procured another loan from the same parties of \$5,000, and secured the same by a mortgage on the same piece of land, and again on the 18th day of June, 1911, procured from the same parties another loan of \$3,000 secured by another mortgage on the Clay county, Minnesota, or Glyndon, tract of land, and again on the 23th day of June, 1911, executed to said Northern Trust Company another mortgage for \$575 on the said Clay county, or Glyndon, tract of land. The first knowledge of these transactions came to the plaintiff about September 27, 1911, when her counsel found the mortgages of record. Defendant, however, contends that the proceeds of these loans were credited upon plaintiff's contract to purchase and upon the indebtedness she owed to the defendant, and upon the date of the receipt of the said loans, and alleges that they were placed upon said real estate for plaintiff's benefit, and for the purpose of not only reducing her indebtedness to the defendant, but for the purpose also of facilitating the sale of said lands, and that he had told her he would make them. This claim is also made in regard to the sum of \$1,781.89, being rents and profits collected from the said Glyndon and Argusville farms during the year 1911.

On the question of undue influence, the plaintiff admitted on cross-examination that the part of the papers that the defendant read to her related to the so-called Barry farm, that is to say, sections 11 and 12, and that he read her a part which was similar to, "and the said party of the second part hereby covenants and agrees to pay the said party of the first part the sum of \$75,000, payable at the office of said John Wyman," and that he might have read the description to her, that she did not remember that, but did remember about the price; that after signing the papers on Monday morning she went on a pleasure trip to Detroit, and came back to Fargo on Tuesday, the 13th, and on that

night started home. She also admits that after reaching home on June 15, 1911, she wrote the following letter to the defendant: "I got home oll right although it was the highest time. I felt so bat all afternoon I hardly could stant it I got such a bain in my back and side I was sick. I found everything all right. It was just as I told you they all exspected me Sunday night that is the reason they didend right. I had to work all day. I was hardly able to stand on my feed my well drillers finished that well to night it cost me about \$250 dollars, my plumb here at home was broke hat to get it fixed today fore tomorrow there are 100 and 1 thing, waiding for me the charries are all ribe the trees loaded but they are very small it is hart to work with them Frank hangs on me like a baby he said ma, it isend like home when you are gone I intentet to rite to you last night, it was impossible, they all had so much to say. Dear Friend I will try ant thank in a few words fore all the good and kindness you have give me while I was with you. I cant say much. I know you will understand me. Dear friend as long as I was by you I feld so good, now Im alone Im as misrable as ever just think what a terrible burden I but on my shoulders \$75000 Dollers, just think of it I tont believe Il ever live trough it I wish I never bought it. Im afraid it is going to brake me up, my head is working rownd and I cant eat or sleep I feel such a weight on my heart how is dear little Mary how are you and Elen and all hoping you are all better than I I must close my close are boiling over. hoping to hear from you I send my love and best wishes to you and all Emma Sch." And again on August 30th, wrote: "Mr. Wyman Dear Sir Mr. Petrie called me by Phone today. when I got there I was astonished to find that you had told him about that terible deal as you had told me not to tell anyone about it, which I truly and honestly didend I never told one sole but the lawyer, and that habend I tont gwife know myself, when I got home in some company I said if everything would go all right *I intended to go to Fargo to live* then a friend of mine said I couldend do that, the minet I left my hom, I had no right to come back, I would loose all rights in that home, then came to my mind what you said in the train on our way home, that gave me the last shock It nearly upset my mind, I could find no rest nowhere. I towght I lost everything, then I waided for you did not come then I rote to you you still but me of another week or 2 I could not stand it any longer I went to a lawyer All I wanted I wanted

to find out about my home then he asked gwestions I had to answer, that is how it came I had to tell on you. I never intended to harm you in the least nor anyone else. I read your letter over and over again all I can remember of it is that you said I lied that is harter then a blow in my face I would tought anything before I would believed you do that again me. I always done all I could fore you last fall when you came to me in your trouble I treated you as well as I knew how to helb you get all that money I acomodaded you in every way I could, you know what a hart place I got and what a reck I am, and everything wearyes me so. now Mr. Wyman as a friend of mine you hat ought never let me make such a deel you know I didend wand it, instead of coaxing me you ought to told me to think it over or figer ub the interest ant exsbences to me but you never mentioned the exbense on such a place all I intended the man to do was to ask you if it was not bossible fore you to give me my papers back yow showld waid and not sell my land until I had seen you now you know all of that, still that wasend all yet there was another deal which means \$3900 D fore me and then came Yenrick with that \$2000 I had sined fore you and now mr. Wyman you know that \$5000 D node of yours at the Petrie Bank was due a month ago and you didend mensiown it in your letter why is it now Mr. Wyman but yourself in my blace tont you truly think it is enough to crush the heart of a strong man Where do you think my brains shell land ad I am riting this to you as I have no one to speak to. I cant make up my mind to tell Frank it would crush the Poor child down as he needs all the strength he has fore his studies tell Mrs Wyman to rite to me if she could truly Emma."

Mrs. Wyman also testified that on the morning of the execution of the papers the plaintiff told her that "she had bought the farm and she thought she was going to enjoy it here, and planned on coming up here and spending her summers and living here, had a nice large house, and bringing her son with her, her son would enjoy it so much." The defendant himself denied all charges of undue influence or fraud. He admits inducing the plaintiff to endorse his notes as an accommodation indorser, but testifies that he has paid two of them, and was ready to pay the other when presented, and had paid her \$460 for the accommodation. He admits trying to induce her to go into the land business with him, and states that when she was unwilling and seemed to be

more interested in land, he tried to sell her the land in controversy. He claims that he read all the papers over to her, and that it was all satisfactory with her. He also denies that the plaintiff was in any way disqualified from transacting business on account of her visit to the corn doctor. In this he is corroborated by the notary public. This witness, among other things testified: "I could not repeat all that was said because we conversed quite a long time, but Mr. Wyman came into the office, and brought this lady, Mrs. Schinzer, and introduced her and stated that she wished to have acknowledgments taken and a couple of instruments. These instruments were presented and Mrs. Schinzer sat down at my desk and signed these instruments, and before signing I explained to her the nature of the instruments, that they were deeds covering certain land and made in favor of a certain party. She signed them and I put to her the usual question, whether she acknowledged their execution, and she replied in the affirmative, and Mrs. Miller was called in to witness the instruments. In the meantime conversation ensued in which either Mr. Wyman or Mrs. Schinzer mentioned the fact that she had purchased this,—a certain other farm out here at—I think I knew it as the Barry farm,—and there was considerable other talk about Mrs. Schinzer's personal experience, or affairs to some extent, the principle fact of which, that I remember most clearly, is the fact that she was farming in Illinois, and that she had made a deal for the purchase of the Barry farm at Mapleton. I don't think—in fact I am positive now—the details were not gone into as to the transaction. I don't think, and I am quite positive, none of the details of the conversation were gone into in any way, except we conversed back and forth for probably half an hour, on such a matter. I had not the least difficulty in conversing with Mrs. Schinzer as to her understanding English. She seemed to—I could clearly understand her and her statements. She appeared to be in good health. Q. And how did she—as to talking over business matters, did she answer intelligently and talk intelligently of her business matters? A Yes, I thought that she appeared to be exceptionally so for a lady transacting business. I remember most distinctly that either she or Mr. Wyman mentioned the fact that she had a farm in Illinois that had been left her by her husband; that is, it had belonged to the family of her husband, and her husband had died, and Mr. Schinzer didn't leave things in the very

best of shape, but she had been a very industrious and energetic woman, taken hold and managed the farm herself, and she related the fact, as I remember most distinctly, that she even went to the extent of driving teams and harnessing and taking care of her own horses; that she had made a great success of her management down there, and was now branching out." On the other hand, Mr. Lacy, the attorney for the plaintiff, testified: "I am one of the attorneys for the plaintiff in this action. The action was commenced about the 3d of July, 1911, and shortly after the action was commenced I had a conversation with Mr. Engebretson, the witness who just preceded me, and in that conversation I asked him in regard to,—I asked him if he took the acknowledgments of certain deeds of Mrs. Schinzer on the 12th day of June, 1911, and he told me he did, and I asked him if he knew anything about the transaction. He said he didn't know much about it. And I asked him if he knew—if he was certain as to whether or not Mrs. Schinzer knew what she was signing. He says, 'Well, as to the deeds, I think she did, because I looked upon the transaction as a suspicious one, and so I asked her if she knew what she was signing, and she said she did, and then I took her acknowledgments to the deeds.'" The making of these statements, however, was denied by Mr. Engebretson.

Watson & Young and E. T. Conmy, for appellant.

The one particular ground upon which plaintiff asks for cancelation in her complaint has been ignored, and the court has gone out of the issues to find independent grounds for the decree of cancelation entered. Such procedure requires a reversal of the judgment. *Harkins v. Cooley*, 5 S. D. 227, 58 N. W. 560; *Couch v. State*, 14 N. D. 361, 103 N. W. 942; *Chaffee-Miller Land Co. v. Barber*, 12 N. D. 478, 97 N. W. 850.

It is not the province of courts to make contracts for parties, nor to "undo a bargain because it is hard," nor to deprive a person of the fruits of a good bargain, in the absence of other sufficient reasons. *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 355, 19 L. ed. 955, 960, 3 Mor. Min. Rep. 291; *Heyrock v. Surerus*, 9 N. D. 28, 81 N. W. 36; *Henniges v. Paschke*, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; 3 Cyc. 267, 268; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 510.

Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112; *Maxwell Land-Grant Case*, 121 U. S. 380, 30 L. ed. 958, 7 Sup. Ct. Rep. 1015; *Ruttland Marble Co. v. Ripley*, 10 Wall. 339, 354, 19 L. ed. 955, 960, 3 Mor. Min. Rep. 291; *Veazie v. Williams*, 8 How. 134, 157, 12 L. ed. 1018, 1028; *Union R. Co. v. Dull*, 124 U. S. 173, 183, 31 L. ed. 417, 421, 8 Sup. Ct. Rep. 433.

Fraud and misrepresentation must clearly appear. *Maxwell Land-Grant Case*, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 300, 31 L. ed. 747, 756, 8 Sup. Ct. Rep. 850; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 317, 31 L. ed. 182, 186, 8 Sup. Ct. Rep. 131; *United States v. Hancock*, 133 U. S. 193, 197, 33 L. ed. 601, 604, 10 Sup. Ct. Rep. 264.

To set aside a written contract, fraud or misrepresentation must be proved by clear, convincing, and unambiguous evidence. *Jasper v. Hazen*, 4 N. D. 6, 23 L.R.A. 58, 58 N. W. 454; *Eames v. Hardin*, 111 Ill. 634; *Gassert v. Bogk*, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. 281, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. Rep. 738; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957; *Ensminger v. Ensminger*, 75 Iowa, 89, 9 Am. St. Rep. 462, 39 N. W. 208; *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Kent v. Lasley*, 24 Wis. 654; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714; *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347; *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856; *Little v. Braun*, 11 N. D. 410, 92 N. W. 800; *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160; *Heyrock v. Sure-rus*, 9 N. D. 28, 81 N. W. 36; *Chilson v. Houston*, 9 N. D. 498, 84 N. W. 354; *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032; *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499; *Anderson v. Anderson*, 17 N. D. 275, 115 N. W. 836; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306.

A complaint which charges that a party who was to prepare a written contract in pursuance of a previous oral agreement prepares one materially different, and by a trick or device has it signed, charges an actual fraud for which equity will give relief. 1 Pom. Eq. Jur. 877, note; *Bethell v. Bethell*, 92 Ind. 324; *Harrington v. Brewer*, 56 Mich.

301, 22 N. W. 813; 9 Enc. Pl. & Pr. 686-688, and cases cited; Bump, Fraud. Conv. 114, 193, § 28; Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529; 2 Dan. Ch. Pl. & Pr. Perkins's ed. p. 992.

It is settled that the decree must conform to the allegations, as well as to the proofs, in the cause. 1 Dan. Ch. Pl. & Pr. Perkins's ed. p. 377; Story, Eq. Pl. 257; Crocket v. Lee, 7 Wheat. 522, 5 L. ed. 513; Jackson v. Ashton, 11 Pet. 229, 9 L. ed. 698; James v. M'Kernon, 6 Johns. 564; McCormick Harvesting Mach. Co. v. Rae, 9 N. D. 482, 84 N. W. 346; McClory v. Ricks, 11 N. D. 42, 88 N. W. 1043.

The findings and judgment must conform to the issues made by the pleading. Harkins v. Cooley, 5 S. D. 227, 58 N. W. 560; Winona v. Minnesota R. Constr. Co. 27 Minn. 427, 6 N. W. 795, 8 N. W. 148; Devoe v. Devoe, 51 Cal. 543; Gregory v. Nelson, 41 Cal. 278, 12 Mor. Min. Rep. 124; 9 Enc. Pl. & Pr. 684; 18 Enc. Pl. & Pr. 808.

The plaintiff cannot rely on other misrepresentations than those alleged in the bill. 6 Cyc. 333, 334; Touchstone v. Staggs, — Tex. Civ. App. —, 39 S. W. 189; Wren v. Moncure, 95 Va. 369, 28 S. E. 588.

A recovery will not be allowed upon a case, although proved, which differs essentially from that alleged in the bill. Smith v. Nicholas, 8 Leigh, 354; Brown v. Toell, 5 Rand. (Va.) 543, 16 Am. Dec. 759; Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Hunter v. Jett, 4 Rand. (Va.) 104; Potomac Mfg. Co. v. Evans, 84 Va. 717, 6 S. E. 2; Crocket v. Lee, 7 Wheat. 522, 5 L. ed. 513; Dorr v. Pacific Ins. Co. 7 Wheat. 590, 5 L. ed. 531; Hoyt v. Hoyt, 27 N. J. Eq. 399, 28 N. J. Eq. 485.

Parties are confined to the issues made by their pleadings in this court, as much as in a court of law. Stafford v. Stafford, 1 N. J. Eq. 525; 1 Dan. Ch. Pl. & Pr. 328, 434 et seq.; Doughty v. Doughty, 7 N. J. Eq. 643; Pasman v. Montague, 30 N. J. Eq. 385; Montesquieu v. Sandys, 18 Ves. Jr. 302, 11 Revised Rep. 197; Snider v. Wilson, — Iowa, —, 78 N. W. 802; United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; Wait v. Kellogg, 63 Mich. 138, 30 N. W. 80, 18 Enc. Pl. & Pr. 899; Oliphant v. Liveridge, 142 Ill. 160, 30 N. E. 334; 1 Am. & Eng. Enc. Law, 2d ed. p. 560, and cases cited; Smith v. Allis, 52 Wis. 337, 9 N. W. 155; 1 Cyc. 619, 620, 623-626.

Fraud without damage is no ground for relief. Garrow v. Davis, 15

How. 272, 277, 14 L. ed. 692, 694; *Smith v. Richards*, 13 Pet. 26, 37, 10 L. ed. 42, 47; *Marshall v. Hubbard*, 117 U. S. 415, 417, 29 L. ed. 919, 6 Sup. Ct. Rep. 806; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 10, 38 L. ed. 55, 59, 14 Sup. Ct. Rep. 240; *Farnsworth v. Duffner*, 142 U. S. 43, 55, 35 L. ed. 931, 936, 12 Sup. Ct. Rep. 164; *Clarke v. White*, 12 Pet. 178, 196, 9 L. ed. 1046, 1054; *Conard v. Nicoll*, 4 Pet. 291, 297, 7 L. ed. 862, 864; *United States v. Arredondo*, 6 Pet. 691, 716, 8 L. ed. 547, 556; 2 Pom. Eq. Jur. 898; 6 Cyc. 326; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *Morrison v. Lods*, 39 Cal. 381; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Pasley v. Freeman*, 3 T. R. 51, 2 Smith, Lead. Cas. 66, 1 Revised Rep. 634, 12 Eng. Rul. Cas. 235.

To rescind an executed contract for fraud, there must be damage as well as fraud, and this must clearly appear; and the decree must be according to the allegations, as well as to the proof. *Primmer v. Patten*, 32 Ill. 528; *Wright v. Dame*, 22 Pick. 55; *McElwain v. Willis*, 9 Wend. 548; *McIntyre v. Trustees of Union College*, 6 Paige, 239; *Spence v. Duren*, 3 Ala. 251; *Danels v. Taggart*, 1 Gill & J. 311; *Edwards v. Massey*, 8 N. C. (1 Hawks) 359; *Lingan v. Henderson*, 1 Bland, Ch. 236; *Hood v. Inman*, 4 Johns. Ch. 437; *Edwards v. Chilton*, 4 W. Va. 352; *Crittenden v. Craig*, 2 Bibb, 474; *Cunningham v. Shields*, 4 Hayw. (Tenn.) 44; *Cotton v. Butterfield*, 14 N. D. 473, 105 N. W. 236; *Foster County Implement Co. v. Smith*, 17 N. D. 178, 115 N. W. 663; *Martinson v. Regan*, 18 N. D. 472, 123 N. W. 285; *Clapp v. Tower*, 11 N. D. 556, 93 N. W. 862; *Townshend v. Goodfellow*, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056.

John P. Devine, and *A. C. Lacy*, for respondent.

The term "fiduciary" involved the idea of trust, confidence; it refers to the integrity, the fidelity, of the party trusted. It contemplates good faith, rather than legal obligation. *Stoll v. King*, 8 How. Pr. 298; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808; *Studybaker v. Cofield*, 159 Mo. 596, 61 S. W. 246; *Scattergood v. Kirk*, 192 Pa. 263, 43 Atl. 1030.

"Confidential relations" is a term which includes all the variety of relations in which dominion may be exercised by one person over another. *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836; *Hetrick's*

Appeal, 58 Pa. 477; Roby v. Colehour, 135 Ill. 300, 25 N. E. 778; 2 Pom. Eq. Jur. 956; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032.

A trustee *ex maleficio* arises whenever a person acquires the legal title of property by false and fraudulent promises to hold it for certain specified purposes. Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; Northern P. R. Co. v. Kindred, 3 McCrary, 627, 14 Fed. 77.

A confidential trust relation existed between plaintiff and defendant, and defendant violated his trust when he sought to encumber plaintiff's property for his own use. Towle v. Amb's, 123 Ill. 410, 14 N. E. 689; Robbins v. Butler, 24 Ill. 387; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218; Shute v. Johnson, 25 Or. 59, 34 Pac. 965; Green v. Pessa, 92 Iowa, 261, 60 N. W. 531; Gould v. Gould, 36 Barb. 270; Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898; Carbine v. McCoy, 85 Ga. 185, 11 S. E. 651; Wood v. Evans, 43 Mo. App. 230.

Even though the transaction itself could not have been impeached if no such confidential relation had existed, still the person so availing himself of his position of trust will not be permitted to retain the advantage so fraudulently acquired. Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 434; Nesbit v. Lockman, 34 N. Y. 167; Story, Eq. Jur. 311; Sears v. Shafer, 6 N. Y. 268; Huguenin v. Baseley, 13 Ves. Jr. 105, 9 Revised Rep. 148, 276; Wright v. Proud, 13 Ves. Jr. 138; Harris v. Tremenheere, 15 Ves. Jr. 40, 10 Revised Rep. 5; Hugenin v. Baseley, 14 Ves. Jr. 273, 15 Ves. Jr. 180; Edwards v. Meyrick, 2 Hare, 60, 12 L. J. Ch. N. S. 49, 6 Jur. 924; Hunter v. Atkins, 3 Myl. & K. 113.

The minds of contracting parties must meet and assent to the same thing, in the same sense, and at the same moment of time, or there is no contract. Newlin v. Prevo, 90 Ill. App. 515; Peerless Glass Co. v. Pacific Crockery & Tinware Co. 121 Cal. 641, 54 Pac. 101; Wagner v. Egleston, 49 Mich. 218, 13 N. W. 522; Board of Trade v. De Bruyn, 138 Mich. 187, 101 N. W. 262; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Sutter v. Raeder, 149 Mo. 297, 50 S. W. 813; Brophy v. Idaho Produce & Provision Co. 31 Mont. 279, 78 Pac. 493; Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665; McGavock v. Morton, 57 Neb. 385, 77 N. W. 785; Columbus, H. V. & T. R. Co. v. Caffney, 65 Ohio St. 104, 61 N. E. 152; Foshier v. Fetzner, 154 Iowa, 147, 134

N. W. 556; *Jules Levy & Bro. v. A. Mautz & Co.* 16 Cal. App. 666, 117 Pac. 936; *Cunningham Mfg. Co. v. Rotograph Co.* 30 App. D. C. 524, 15 L.R.A.(N.S.) 368, 11 Ann. Cas. 1147; *Luckey v. St. Louis & S. F. R. Co.* 133 Mo. App. 589, 113 S. W. 703; *Miller v. Sharp*, — Ind. App. —, 100 N. E. 108; *Elks v. North State Ins. Co.* 159 N. C. 619, 75 S. E. 808.

The entire contract, since only a part of it is in writing, will be deemed a parol contract. *Miller v. Sharp*, — Ind. App. —, 100 N. E. 108; *Weber v. Lewis*, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105.

Power to sell does not give power to mortgage. *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047.

A party cannot sit by and permit an incompetent or improper question to be asked without objection, and, when he discovers the answer is against him, move to strike out the answer. *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847; *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042, 18 Ann. Cas. 192; *State v. Dahlquist*, 17 N. D. 40, 115 N. W. 81.

The assumption is that evidence offered without objection is made competent by agreement of counsel, or is deemed competent, and the attention of the trial court not having been called to it, it comes too late to first raise such question on appeal. *Davis v. Mills*, — Tex. Civ. App. —, 133 S. W. 1064; *Belber Truck & Bag Co. v. Silberblatt*, 44 Pa. Super. Ct. 32; *H. C. Behrens Lumber Co. v. Lager*, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128; *Weik v. Pugh*, 92 Ind. 382; *Stanley v. Sutherland*, 54 Ind. 339; *State v. Eisenhower*, 132 Mo. 140, 33 S. W. 785; *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335; *State v. Dahlquist*, 17 N. D. 40, 115 N. W. 81.

In an action tried without reference to the pleadings, when no evidence is objected to as incompetent, the court should determine on all the evidence given and so receive, without reference to the pleadings. *Barcus v. Dorries*, 64 App. Div. 109, 71 N. Y. Supp. 695; *Alabama Steel & Wire Co. v. Symons*, 110 Mo. App. 41, 83 S. W. 78; *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.* 86 C. C. A. 648, 159 Fed. 824; *Cumberledge v. Brooks*, 235 Ill. 249, 85 N. E. 197; *Sample v. Chicago, B. & Q. R. Co.* 233 Ill. 564, 84 N. E. 643; *Chicago, B. & Q. R. Co. v. Sample*, 138 Ill. App. 95; *Leigh v. National Hollow Brake Beam Co.* 131 Ill. App. 106; *Helmbacher Forge & Rolling Mills Co.*

v. Bartels, 133 Ill. App. 22; Von Trebra v. Laclede Gaslight Co. 209 Mo. 648, 108 S. W. 559; Devlin v. Charleston & W. C. R. Co. 79 S. C. 469, 60 S. E. 1123; Ragsdale v. Illinois C. R. Co. 236 Ill. 175, 86 N. E. 214; Western U. Teleg. Co. v. Buchanan, — Tex. Civ. App. —, 129 S. W. 850; Gascoigne v. Metropolitan West Side Elev. R. Co. 239 Ill. 18, 87 N. E. 883, 16 Ann. Cas. 115.

A motion grounded in an alleged variance does not preserve the consideration of such variance as a question of law for review by this court, in the absence of an objection, or a motion to exclude. Johnson v. Gary, 18 Idaho, 623, 111 Pac. 855, 1 N. C. C. A. 800; Aulbach v. Dahler, 4 Idaho, 654, 43 Pac. 322; Bell v. Knowles, 45 Cal. 193; Thompson-Starrett Co. v. Fitzgerald, 79 C. C. A. 427, 149 Fed. 721; Chicago & E. I. R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169; Landt v. McCullough, 121 Ill. App. 328; Beverley v. Boston Elev. R. Co. 194 Mass. 450, 80 N. E. 507; Gaume v. Horgan, 122 Mo. App. 700, 99 S. W. 457; Bird v. Gustin-Boyer Supply Co. 123 Mo. App. 36, 99 S. W. 775; Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76, 1034.

Further than this, defendant tendered evidence to meet the evidence he now says was objectionable. Taliaferro v. Shepherd, 107 Va. 56, 57 S. E. 585; Illinois C. R. Co. v. Heath, 228 Ill. 312, 81 N. E. 1022; Davis v. Illinois Collieries Co. 232 Ill. 284, 83 N. E. 836; Continental Casualty Co. v. Maxwell, 127 Ill. App. 19; Taylor v. Southerland, 7 Ind. Terr. 666, 104 S. W. 874; Hammond v. Porter, 150 Mich. 328, 114 N. W. 64.

There was no affidavit filed stating that defendant had been misled to his prejudice by an alleged variance, and such variance is not available on appeal. Farmers' Bank v. Manchester Assur. Co. 106 Mo. App. 114, 80 S. W. 299.

Sufficiency of a pleading to present a certain issue, cannot be urged on appeal where the parties tried such issue in the lower court, without objection. Ashe v. Beasley, 6 N. D. 191, 69 N. W. 188; Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 306; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; California Portland Cement Co. v. Wentworth Hotel Co. 16 Cal. App. 692, 118 Pac. 103, 113; Stilwell v. Carpenter, 62 N. Y. 639, 2 Abb. N. C. 238; Eastwood v. Relsof Min. Co. 86 Hun, 91, 34 N. Y. Supp. 196; Guley v. Northwestern Coal & Transp. Co. 7 Wash. 491, 35 Pac. 372;

Thomas v. Black, 84 Cal. 221, 23 Pac. 1037; More v. Burger, 15 N. D. 345, 107 N. W. 200; Scott v. Scott, 83 Conn. 634, 78 Atl. 314, 21 Ann. Cas. 965; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; Geanakoules v. Union Portland Cement Co. 41 Utah, 486, 126 Pac. 329; O'Brien v. Northwestern Consol. Mill. Co. 119 Minn. 4, 137 N. W. 399; Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; Place v. Minster, 65 N. Y. 89; Burt v. C. Gotzian & Co. 43 C. C. A. 59, 102 Fed. 937.

The variance must be specifically pointed out. Probst Constr. Co. v. Foley, 166 Ill. 31, 46 N. E. 750; Joliet v. Johnson, 177 Ill. 178, 52 N. E. 498; Zellers v. White, 208 Ill. 518, 100 Am. St. Rep. 243, 70 N. E. 669; Gascoigne v. Metropolitan West Side Elev. R. Co. 239 Ill. 18, 87 N. E. 883, 16 Ann. Cas. 115; DeLaney v. Western Stock Co. 19 N. D. 630, 125 N. W. 499; Galvin v. O'Gorman, 40 Mont. 391, 106 Pac. 887; Gilson v. Hays, 2 Kan. App. 460, 43 Pac. 93.

If matters which should have been pleaded are admitted by counsel to be given in evidence, they will have the same effect as though pleaded. Jackson ex dem. Lathrop v. Demont, 9 Johns. 55, 6 Am. Dec. 259; Thomas v. Black, 84 Cal. 221, 23 Pac. 1037; National State Bank v. Boesch, 90 Iowa, 47, 57 N. W. 641; Hollenback v. Stone & W. Engineering Corp. 46 Mont. 559, 129 Pac. 1058; Ward v. Brown, 31 S. D. 296, 140 N. W. 698; Fidelity & D. Co. v. Hibbler, — Mich. —, 143 N. W. 604; Dickinson v. White, 25 N. D. 523, 49 L.R.A.(N.S.) 362, 143 N. W. 754.

A suit to set aside conveyance of an agent under power of attorney constitutes a revocation of such power of attorney. Hatch v. Ferguson, 14 C. C. A. 41, 29 U. S. App. 540, 66 Fed. 668.

Authority to sell lands, unless otherwise expressly provided, is authority only to sell for cash on delivery of deed. Marble v. Bang, 54 Minn. 277, 55 N. W. 1131; Hall v. Storrs, 7 Wis. 253; Persons v. Smith, 12 N. D. 403, 97 N. W. 551; Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194; Larmon v. Knight, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, 30 N. E. 318; Towle v. Ambs, 123 Ill. 410, 14 N. E. 689; Potter v. Couch, 141 U. S. 321, 35 L. ed. 734, 11 Sup. Ct. Rep. 1005; Nester v. Gross, 66 Minn. 371, 69 N. W. 39; 2 Pom. Eq. Jur. 1053.

Courts of equity do not lend themselves as agents to perpetuate fraud and robbery, or to assist parties in retaining the proceeds. *Reddin v. Dunn*, 2 Colo. App. 518, 31 Pac. 947; *Oard v. Oard*, 59 Ill. 47; *Frazier v. Miller*, 16 Ill. 49; *Jones v. Neely*, 72 Ill. 449; *Brannan v. Strauss*, 75 Ill. 235; *White v. White*, 89 Ill. 461.

BRUCE, J. (after stating the facts as above). It is impossible to sustain the judgment of the trial court, under the pleadings and the evidence in this case.

The case presented by the pleadings is one of fraud and of a successful attempt to induce the plaintiff to sign two warranty deeds and a contract of purchase, when she merely thought she was executing, and merely intended to execute, a permission to the defendant to sell certain real estate as her agent.

The trial court, however, decided the case and found the issues for the plaintiff as if the issues presented by the pleadings had been the obtaining of the deeds and the contract of purchase by undue influence, and also bases his conclusion quite largely upon the assumption that the plaintiff thought she was signing an option, rather than a contract, to purchase. These findings are irreconcilable, and no foundation for them is laid in the pleadings.

The trial court, indeed, decided the case upon points which were not raised or relied upon by the plaintiff, and which probably never occurred either to her or her attorney until after the tentative opinion was prepared. We cannot find any evidence, and the trial court did not find any proof, of any substitution of documents, or of the perpetration of any direct fraud at the time of the execution of the deeds and contract in question.

To our minds all the evidence in regard to the undue influence, if any, was inadmissible, except as tending to show a preconcerted scheme leading up to the fraud alleged, and this fraud was not proved.

The allegations as to undue influence, indeed, are, as we read the complaint, merely pleaded by way of inducement, while the real gist of the complaint is fraud. There is, as we have before stated, really nothing in the evidence to sustain the allegations of the complaint. The plaintiff herself admits that she executed some papers; that a part of the contract relating to the \$75,000 transaction was read to her. On

the morning that she executed the contract and the deeds she told defendant's wife that she had purchased the land, and after arriving home she wrote to her to the same effect. She executed and acknowledged the deeds before a notary public, and he testifies positively that he read them over and explained them to her; that she signed at his desk in his office; that he asked her whether she signed them voluntarily, and she answered that she did. He testifies that she appeared to be in good health at the time, and that she impressed him as being an intelligent woman in business affairs. He also testified that it was stated, either by her or by the defendant, in his presence, that she was buying the Barry farm. This testimony is not disputed, and there is absolutely nothing in the record to show fraud or to sustain the charge in the complaint that the defendant induced the plaintiff to sign a contract for purchase and deeds when she thought she was merely signing a permission to sell. The testimony in regard to her ill health is inconclusive. All that is shown is that she had a corn or some other growth on her foot, and that, while having it treated, she fainted. There is no proof whatever that at the time she acknowledged and executed the instruments she was not in the full possession of her faculties. Much less credit can be given to the attempt to show that on the night before the execution of the deeds and contract the defendant made her intoxicated, or overcame her judgment by the use of liquor. She was a German by descent, and the evidence shows that she had drank beer on previous occasions. All the liquor that she drank on the particular occasion was half a glass of beer. This was drunk on Sunday night. The deeds were executed towards noon on Monday morning. Before going down town on Monday morning she told Mrs. Wyman that she had bought the Barry farm. She does not for a moment say that she was intoxicated or overcome by the use of the liquor. Even if she had been, and we gave to half a glass of beer potentialities which no sane man would believe it to possess, it is beyond reason to suppose that the influence of the half glass extended over night and up to the following noon. It is by no means proved that the land was not worth what she agreed to pay for it. It might have been unwise for the plaintiff to buy it, but a court cannot arbitrarily undo solemn contracts merely because their entering into may have been unwise. *Ruttland Marble Co. v. Ripley*, 10 Wall. 339, 355,

19 L. ed. 955, 960, 3 Mor. Min. Rep. 291; *Heyrock v. Surerus*, 9 N. D. 28, 81 N. W. 36; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; 6 Cyc. 267, 268. "Canceling an executed contract," says the Supreme Court of the United States in *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112, "is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them." See also *Maxwell Land-Grant Case*, 121 U. S. 380, 30 L. ed. 958, 7 Sup. Ct. Rep. 1015; *Veazie v. Williams*, 8 How. 134, 157, 12 L. ed. 1018, 1028; *Union R. Co. v. Dull*, 124 U. S. 173, 183, 31 L. ed. 417, 421, 8 Sup. Ct. Rep. 433; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 300, 31 L. ed. 747, 756, 8 Sup. Ct. Rep. 850; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 317, 31 L. ed. 182, 186, 8 Sup. Ct. Rep. 131; *United States v. Hancock*, 133 U. S. 193, 197, 33 L. ed. 601, 604, 10 Sup. Ct. Rep. 264; *Jasper v. Hazen*, 4 N. D. 1, 6, 23 L.R.A. 58, 58 N. W. 454; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714; *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856; *Little v. Braun*, 11 N. D. 410, 92 N. W. 800; *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160; *Heyrock v. Surerus*, 9 N. D. 28, 81 N. W. 36; *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499; *Anderson v. Anderson*, 17 N. D. 275, 115 N. W. 836.

Even if undue influence were an issue in the case, we are hardly able to find it from the evidence. The plaintiff was not a grossly ignorant woman. She appears to have been able to accumulate quite a little property, and to have been able to manage her real estate with a good deal of success. The evidence in regard to her pain and suffering is entirely inconclusive. It is a noticeable fact that after signing the papers she took a pleasure trip in an automobile to Detroit. If she fainted at all it was merely in the doctor's office pending a slight operation on her foot, which does not seem to have prevented her going to Detroit or from leaving for Illinois the next day. The letters written to Mr. and Mrs. Wyman immediately after her return to Illinois show clearly that she understood that she had agreed to purchase the

land. One letter at least was written before she had consulted her lawyer or anyone else, and she must have learned the facts therein disclosed, either from a perusal of the documents or from the statements of the defendant. The evidence, indeed, seems to conclusively point to the fact that she did not think of repudiating the transaction until influenced by her friends and family in Illinois, who seemed to have been unwilling that she should leave that state. If there was undue influence in this case, there is undue influence in almost every transaction in the business world. There is hardly a sale, whether of merchandise in a store, of a book in an office, or of a piece of land, or of farm machinery, in which the seller does not extol his goods and seek to overcome the objections of the purchaser in regard to the greatness of the cost or the extravagance of the investment. It is true that in this case the plaintiff was a woman, but she was a business woman. Women in these modern days have been released from bondage, and have been placed upon a business and intellectual equality with men. They can hold separate property, they can enter into partnerships, and they can make their own contracts. To hold the plaintiff's contract in this case null and void would be to hold that no contract made by a woman has any binding force or validity, but can be set aside on the merest pretext, and be the subject of future litigation. Such a holding would take from woman the very advantages which the statute has given to her. What she has been asking for has been an opportunity to stand for herself and to exercise her own judgment and personal freedom. If we practically invalidate her contracts, and make them like those of a child, voidable at her option, we will simply preclude the making of contracts altogether, for no person will deal with her on any such a basis. We cannot place adult women in the same category as infants, idiots, and insane persons.

We can hardly hold from the evidence that the contract was absolutely unreasonable or inequitable, or that it was not, except for the magnitude of the purchase, such a one as is not every day made in real estate circles. Mrs. Schinzer agreed to purchase the two sections of land for \$75,000. There is no proof or claim that this was an exorbitant price. Mr. Wyman agreed to himself purchase the land for \$64,000, which he did, the difference being in the neighborhood of \$8.50 an acre. He agreed with Mr. Barry to take a \$35,000 mortgage

upon the land as part of the purchase price, at an annual interest of 6 per cent. This agreement was assignable. He sold the Glyndon land and the Argusville land for \$29,400, and for about what the joint value of the farms was estimated to be. In addition to this, Mrs. Schinzer was credited the proceeds of the 1911 crops, which amounted to \$1,782. The transaction then would have allowed Mrs. Schinzer to keep her Illinois farm unencumbered, and to acquire the two sections of valuable land in North Dakota, providing that she gave a \$35,000 mortgage on the North Dakota land, and provided in some way for the payment of the \$11,000 to the defendant, Wyman, which she could do by a second mortgage, or by mortgaging her Illinois land. If she chose not to do this, but was satisfied with retaining her purchase in North Dakota alone, which would be a reasonable proceeding, as the farm was not merely in close proximity to the village of Mapleton, but within 11 miles of Fargo and she could have educated her son at either place, she could have sold her Illinois land. If she had done this for \$200 an acre, she would have had enough to pay all the obligations on the North Dakota land, and would have had 1,280 acres of land situated in the best section of the Red River Valley, practically free and clear from all encumbrances. If she had sold the Illinois land for \$150 an acre, she would only have had to assume a \$10,000 mortgage, or a mortgage of about \$8.50 an acre on the North Dakota land, in order to handle the deal. Instead of having the care and responsibility of three farms in three states, she would have had one large farm in one state.

So, too, there is no proof that the land purchased was not worth the price which was agreed to be paid. The case merely appears to be one where a person has made a binding contract, but has later been persuaded by her relatives and friends that it would have been better if she had not made it. There are few of us who, after we have made a business deal, do not wonder if we were wise in doing so. There are few of us who do not have friends who tell us that we have been foolish. These things, however, do not justify the setting aside of solemn contracts which are entered into under all of the formalities of the law. If they did, real-estate titles would be of but little value, and there would be no security in the business world. *Ingwaldson v. Skrivseth*, 7 N. D. 388, 75 N. W. 772.

It is not necessary for us to here consider the right of the defendant Wyman to mortgage the lands in question. The deeds and contract are not sought to be set aside on this ground. There is to be found in the pleadings no claim of a breach of condition or consideration, nor any prayer that the contract and deeds may be set aside on those grounds. The case presented by the pleadings, indeed, is merely a case of fraud and of a successful attempt to induce the plaintiff to sign two warranty deeds and a contract of purchase, instead of a mere permission to sell.

The judgment of the District Court is reversed, with directions to dismiss the complaint. The costs and disbursements of the proceedings so far incurred are to be taxed against the plaintiff.

Since, however, the contract is still alive, and the defendant has stated in his testimony that he is ready, able, and willing to perform the same, and said defendant or his grantees have been in possession of the land in controversy since the commencement of the suit, the trial court will retain jurisdiction of the case to the end that an additional and supplemental complaint may be filed, that an accounting may be had, that if possible a specific performance of the contract may be obtained, and that the rights and equities of both parties may be protected.

SAVINGS DEPOSIT BANK, a Domestic Corporation, v. OLE ELLINGSON, Annie Ellingson, Minneapolis Iron Store Company, a Corporation, Lewis O. Anderson, Louisa Anderson, Chester Cranmer, E. T. Fisher, and all Other Persons Claiming Any Right, Title, or Interest in or Lien or Encumbrance upon the Real Estate Described in Plaintiff's Complaint, and All Their Unknown Heirs.

(146 N. W. 906).

Plaintiff was owner of a promissory note and interest coupons secured by real-estate mortgage. The first instalment of interest being unpaid, foreclosure was had under the power of sale, and the certificate later assigned to defendant E., who obtained sheriff's deed. Later plaintiff foreclosed upon the princi-

pal mortgage and the remaining interest coupons, and in due course received sheriff's deed. The assignment to E. contained the express stipulation, "this assignment is made without recourse . . . and also made subject to the balance of the mortgage not included in foreclosure." *Held*:

Mortgage — terms of — statute — control — determination of priority — foreclosure — owner.

1. That notwithstanding the statutes of the state or terms of the mortgage, the parties had determined by contract the priority of their respective claims, and defendant E.'s interest was subordinate to that of plaintiff, who after the foreclosure became the absolute owner of the premises.

Opinion filed March 30, 1914. Rehearing denied April 22, 1914.

Appeal from the District Court of Mountrail County, *Frank E. Fisk*, Judge.

Reversed.

George A. McGee, for appellant.

Each of the instalment payments covered by a mortgage shall be deemed as a separate and independent mortgage, and the mortgage for each instalment may be foreclosed in the same way and with like effect as though separate mortgages. N. D. Codes 1905, § 7458; *McCurdy v. Clark*, 27 Mich. 445; *Kimmell v. Willard*, 1 Dougl. (Mich.) 217.

No one instalment in such a mortgage has any preference over the other. *Cooper v. Ulmann*, Walk. Ch. (Mich.) 251; *English v. Carney*, 25 Mich. 178; *Edgar v. Beck*, 96 Mich. 419, 56 N. W. 15.

Such a mortgage may be foreclosed for delinquent instalments of interest, when it provides that interest shall be paid at given times. *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601, 47 N. W. 127.

The pro-rata rule prevails in part payment of the several notes, irrespective of their dates, maturity or assignment. *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 27 L.R.A. 663, 45 Am. St. Rep. 748, 29 S. W. 903; *Donley v. Hays*, 17 Serg. & R. 404; *Cowden's Estate*, 1 Pa. St. 278; *Mohler's Appeal*, 5 Pa. 420, 47 Am. Dec. 413; *Perry's Appeal*, 22 Pa. 43, 60 Am. Dec. 63; *Grattan v. Wiggins*, 23 Cal. 16; *Dixon v. Clayville*, 44 Md. 575; *English v. Carney*, 25 Mich. 181; *Parker v. Mercer*, 6 How. (Miss.) 324, 38 Am. Dec. 438; *Cage v. Ilco*, 5 Smedes & M. 410, 43 Am. Dec. 521; *Pugh v. Holt*, 27 Miss.

461; *Andrews v. Hobgood*, 1 Lea, 693; *Parish Exch. Bank v. Beard*, 49 Tex. 363; *Delespine v. Campbell*, 52 Tex. 4; *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907; *Penzel v. Brookmire*, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15; *Commercial Bank v. Jackson*, 7 S. D. 135, 63 N. W. 548; *McCurdy v. Clark*, 27 Mich. 445; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601, 47 N. W. 127; *Fourth Nat. Bank's Appeal*, 123 Pa. 473, 10 Am. St. Rep. 538, 16 Atl. 779; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500, 30 N. W. 686; *Todd v. Cremer*, 36 Neb. 430, 54 N. W. 674; *Jones Mortg.* 5th ed. 822, 1701; *Borden v. McNamara*, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841.

Under the terms of the assignment, the rights of Ellingson were subject and subsequent to the unmatured instalments. *Grattan v. Wiggins*, 23 Cal. 31.

The mortgage has the right to fix by agreement the rights of the holders of the several notes to the mortgage security; and such an agreement may be implied from the circumstances of the transfer. *Sherwood v. Dunbar*, 6 Cal. 53; *Keyes v. Wood*, 21 Vt. 339; *Langdon v. Keith*, 9 Vt. 299; *Wright v. Parker*, 2 Aik. (Vt.) 212; *Pattison v. Hull*, 9 Cow. 752; *McVay v. Bloodgood*, 9 Port. (Ala.) 547; *Bank of England v. Tarleton*, 23 Miss. 173.

Such rights may be regulated by contract. *McVay v. Bloodgood*, 9 Port (Ala.) 547; *Exchange Bank v. Eddy*, 10 Ohio L. J. 389; *Morgan v. Kline*, 77 Iowa, 681, 42 N. W. 558; *Rolston v. Brockway*, 23 Wis. 407; *Langdon v. Keith*, 9 Vt. 299; *Wright v. Parker*, 2 Aik. (Vt.) 212; *Thayer's Appeal*, 6 Sadler (Pa.) 392, 9 Atl. 498; *Granger v. Crouch*, 86 N. Y. 494; *Mechanics' Bank v. Bank of Niagara*, 8 Wend. 410; *Norton v. Stone*, 8 Paige, 222; *Dunham v. W. Steele Packing & Provision Co.* 100 Mich. 75, 58 N. W. 627; *Norton v. Palmer*, 142 Mass. 433, 8 N. E. 346; *Foley v. Rose*, 123 Mass. 557; *Bryant v. Damon*, 6 Gray, 564; *Anglo-American Land, Mortg. & Agency Co. v. Bush*, 84 Iowa, 272, 50 N. W. 1063; *Walker v. Dement*, 42 Ill. 272; *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883; *Bank of England v. Tarleton*, 23 Miss. 173; *Solberg v. Wright*, 33 Minn. 224, 22 N. W. 381; *Chew v. Buchanan*, 30 Md. 367; *Jumel v. Jumel*, 7 Paige, 591.

Where one purchases property under a deed conveying the same, "subject to a mortgage hereinafter particularly mentioned," it is clear

that the parties intended that the grantee was to take the premises subject to the payment of the mortgage. *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382.

Middough & Hunt, for respondents.

There are many high authorities which apply the so-called *pro tanto* rule, giving the note first to mature the prior benefit of the security. *Horn v. Bennett*, 135 Ind. 158, 24 L.R.A. 800, 34 N. E. 321, 956; *Leavitt v. Reynolds*, 79 Iowa, 348, 7 L.R.A. 365, 44 N. W. 567; *New York Security & T. Co. v. Lombard Invest. Co.* 65 Fed. 271; *Aultman-Taylor Co. v. McGeorge*, 31 Kan. 329, 2 Pac. 778.

Where a mortgage secures the payment of a note in instalments of so much, and the first instalment becomes due, and a foreclosure thereon is had, and the premises sold to a third person, who, upon obtaining a deed upon such foreclosure, conveys by deed back to the original mortgagor, such mortgagor takes the property discharged and clear of any encumbrances by reason of subsequent instalments or amounts to become due. *Kimmell v. Willard*, 1 Dougl. (Mich.) 217; *Miles v. Skinner*, 42 Mich. 181, 3 N. W. 918; *Edgar v. Beck*, 96 Mich. 419, 56 N. W. 15; *Nebraska Loan & T. Co. v. Haskell*, 4 Neb. (Unof.) 330, 93 N. W. 1045.

Where a mortgage is foreclosed for a part of the debt secured, all being due, and the mortgaged property is sold, third persons are justified in believing that all has been paid, and the lien of the mortgage is terminated as to creditors and purchasers at the sale. *Loomis v. Clambey*, 69 Minn. 469, 65 Am. St. Rep. 576, 72 N. W. 707.

BURKE, J. The plaintiff bank was the owner of a promissory note and interest coupons secured by real-estate mortgage. The first instalment of interest being unpaid, foreclosure was begun and the premises bid in by the bank for the sum of \$63.90. Some seven months later the bank assigned the said sheriff's certificate to the defendant Ellingson by an instrument in writing which contained the following clause: "This assignment is made without recourse, . . . and also made subject to the balance of the mortgage not included in foreclosure." No redemption was made from this sale, and a sheriff's deed was issued in due time to Ellingson. When a later interest coupon became due, the bank declared the entire mortgage due, and fore-

closed the same by a sale of premises, which were bid in by the bank. No redemption was made from this second sale, and in due course sheriff's deed issued to the plaintiff bank. It is stipulated by the parties that both of the foreclosures were in all things valid. This dispute arises upon action to quiet title brought by the bank against Ellingson and a party claiming under him, as well as the original mortgagors.

The facts were all stipulated by the parties, and adopted as findings of fact by the trial court. This appeal challenges the correctness of the conclusions of law announced by the trial court, and which were to the effect that the sheriff's deed issued to Ellingson passed title to the premises, clear of the lien of the mortgage and remaining interest coupons. We find many interesting questions raised, but will confine ourselves to one proposition, which is decisive of this appeal.

(1) Appellant contends, and we think correctly, that notwithstanding the statutes or terms of the mortgage the parties have the right to determine the priority of their respective claims by contract, and that the assignment quoted is such a contract, and determines that the rights of the bank should constitute a first mortgage, and the rights of the defendant Ellingson in effect the second mortgage upon the premises. This conclusion is supported both by reason and authority. It is hard to believe that the bank would consent to a sale of the first coupon for the sum of \$63, with any other understanding than that it should be inferior to their rights under the original mortgage and interest coupons. It is unreasonable to believe that they would jeopardize their principal loan to collect such a small sum of money. On the other hand, Ellingson would be anxious to obtain this interest coupon and the sheriff's certificate issued thereupon, because it would give him the land, subject only to the mortgage of less than \$200. It seems clear to us that that must have been the intention of the parties at the time the assignment was made, and when the sheriff's deed was issued to Ellingson he became the owner absolutely of the premises, subject only to the mortgage held by the bank. It was his duty, however, to pay this mortgage, or be deprived of his property by foreclosure.

This seems to be the holding of other courts upon the same state of facts. Thus, in *Morgan v. Kline*, 77 Iowa, 681, 42 N. W. 558, it is said: "The mortgagee owned them and the mortgage absolutely, and

had a right to sell such interest therein as he might elect. It was his privilege to sell the last two notes, and to relinquish all claim to the mortgage, or to make the claim he retained junior to that he sold. He adopted the latter plan, and executed an assignment which fixed the respective rights of the mortgagee and the plaintiff. It was duly acknowledged, and represented different interests in real estate, and the record thereof was constructive notice of the interests of the parties thereto." To the same effect see *Grattan v. Wiggins*, 23 Cal. 31, where it is said: "It is clear that the mortgagee has the right by agreement to fix the rights of the holders of the several notes to the mortgage security, and such an agreement may be implied from the circumstances of the transfer." Also in *Bank of England v. Tarleton*, 23 Miss. 173, it is said: "The priority rights of the holder of any note and the lease securing the same may be regulated by contract of assignment so that the usual rules of maturity or *pro rata* distribution would not apply." See also *Dunham v. W. Steele Packing & Provision Co.* 100 Mich. 75, 58 N. W. 627, and a long list of cases compiled and digested in 20 Century Dig. § 1746. Note at page 802, vol. 24 L.R.A.

It is clear, therefore, that the defendant Ellingson lost all his interest in this land when the prior mortgage thereon was foreclosed and sheriff's deed issued to plaintiff. The mortgage given by Ellingson to the defendant Minneapolis Iron Store Company falls with this title. The trial court is directed to vacate the order hereinbefore made, and enter judgment in favor of the plaintiff for the relief demanded.

ARCHIBALD A. DOOLITTLE v. HERMAN NURNBERG.

(147 N. W. 400.)

Foreclosure of mortgage — action — default in payment — waiver — estoppel — defense — necessary allegations and proof wanting.

1. In an action to foreclose a mortgage on real property given to secure the payment of \$22,500 and interest, represented by four promissory notes given in payment of a portion of the purchase price of the property mortgaged, defendant interposed the defense that plaintiff waived the default in the payment of the first note, due April 1, 1911, and that he is estopped from foreclosing

for such default. The trial court held adversely to defendant's contention, and on a trial *de novo* in this court it is held that such defense is without merit, the same not having been either properly alleged or proved.

Mortgage — usual stipulations — default — foreclosure — payment of interest — principal due in part — acceptance of interest — not a waiver of right to foreclose.

2. The mortgage contains the usual stipulation that if default be made in the payment of any sum or the interest when due, it shall be lawful for the mortgagee to foreclose. Also a further stipulation that in case of default in the payment of interest or any instalment of principal, the mortgagee may declare the whole sum due. Sometime after default had occurred in the payment of the interest and principal due on April 1, 1911, defendant mailed to plaintiff a draft for the overdue interest, but paid no part of the principal then due.

Held, that the acceptance of the draft for interest did not operate as a waiver of plaintiff's right to foreclose the mortgage for the amount of the principal.

Default — part payment — foreclosure for full amount secured — election by mortgage — sufficient — personal notice to mortgagor for, necessary.

3. The commencement of the foreclosure proceedings for the collection of the full amount secured by the mortgage was a sufficient exercise by the mortgagee of his election to declare the entire sum due on account of the default in the payment of the first instalment. Under the terms of the mortgage it was not incumbent upon him to give the mortgagor personal notice of his election to declare the entire sum due.

Answer — counterclaims — right of way — dedication — breach of covenants — damages — evidence — proof.

4. Two counterclaims contained in the answer, in which defendant seeks to recover damages for a breach of covenant in the deed of the premises from plaintiff to him because of an alleged dedication by plaintiff of a right of way over a portion of the property, considered, and *held* without merit for the reason that the proof fails to establish the fact of such dedication as alleged, or at all.

Opinion filed April 29, 1914.

Appeal from District Court, Stutsman County, *J. A. Coffey, J.*
Action in foreclosure. From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

Oscar J. Seiler and *A. W. Aylmer*, for appellant.

This action should be dismissed because plaintiff had waived his

right of election to declare the whole sum secured by the mortgage due, and to foreclose for same. *Van Vlissingen v. Lenz*, 171 Ill. 162, 49 N. E. 423.

The right to declare the whole sum due on account of partial default must be exercised with promptness. Such right may be lost by laches. 27 Cyc. 1533, note 62.

The default contemplated in the mortgage may be waived by parol agreement; and neither a court of equity nor of law will enforce a forfeiture or credit, under such parol agreement. 2 Jones, Mortg. p. 140; *Van Syckle v. O'Hearn*, 50 N. J. Eq. 173, 24 Atl. 1024; *Albert v. Grosvenor Invest. Co.* L. R. 3 Q. B. 127, 8 Best & S. 664, 37 L. J. Q. B. N. S. 24.

The actions of a party may constitute a complete waiver of the default, and estop him to proceed to declare the whole sum due, and to foreclose. 16 Cyc. 144; *National Land Co. v. Ferry*, 23 Kan. 140; *Adams v. Rutherford*, 13 Or. 78, 8 Pac. 896.

Where one by his conduct induces another to act on the supposition that certain conditions exist, he will not be heard to deny their existence, to the damage of one who has relied upon such conduct. *Anthes v. Schroeder*, 74 Neb. 172, 103 N. W. 1072; *Larson v. Anderson*, 74 Neb. 361, 104 N. W. 925; *Decker v. Sexton*, 19 Misc. 59, 43 N. Y. Supp. 167; *McDonald v. Beatty*, 9 N. D. 293, 83 N. W. 224; *Hanson v. Hanson Hardware Co.* 23 N. D. 169, 135 N. W. 767; 16 Cyc. 87.

The intention of the plaintiff to grant an extension is wholly immaterial. The question is, Was his conduct such as to mislead defendant to his damage? 40 Cyc. 262 (14); *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1; *Broderick v. Smith*, 26 Barb. 539; *Keator v. Ferguson*, 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678; *Millis v. Ellis*, 109 Minn. 81, 122 N. W. 1119; *Staats v. Wilson*, 76 Neb. 210, 109 N. W. 379.

Equity will step in to prevent fraud and damages resulting. 27 Cyc. 1452, notes 66, 67.

Where a grantor conveys real property with full covenants of warranty, when he has neither title nor possession, there is at once a constructive eviction of the grantee, which entitles him to the same rem-

edies as though actually evicted. *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082; *Dahl v. Stakke*, 12 N. D. 325, 96 N. W. 353.

There was a partial failure of consideration, and such defense is proper in an action to foreclose. *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827; *Sweet v. Howell*, 96 App. Div. 45, 89 N. Y. Supp. 21; 20 Decen. Dig. Vendor & Purchaser, § 351 (g).

The plaintiff had dedicated a portion of the land conveyed to the defendant, to the public, before he conveyed to defendant. 13 Cyc. 476 (79), (81), (84), 478 (18), 479 (23), 480-483 (43), 493; *Mason v. Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770; *Lauer v. Lauer Brewing Co.* 180 Pa. 593, 37 Atl. 87; *Collins v. Asheville Land Co.* 128 N. C. 563, 83 Am. St. Rep. 720, 39 S. E. 21; *Watertown v. Troch*, 25 S. D. 21, 125 N. W. 501.

The public had made acceptance of such dedication by constant user. *Mason v. Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770; *Watertown v. Troch*, 25 S. D. 21, 125 N. W. 501; *Larson v. Chicago, M. & St. P. R. Co.* 19 S. D. 284, 103 N. W. 35; *Stephens v. Boyd*. — Iowa, —, 138 N. W. 389; *Kane v. Templin*, — Iowa, —, 138 N. W. 901; 39 Cyc. 1947 (34), 1948 (42).

Carr & Kneeland, for respondent.

An agreement to extend the time of payment must be based upon a valid and sufficient consideration, and for a definite period of time. 7 Cyc. 897, 900; 8 Cyc. 158, and note 36; *Gaar, S. & Co. v. Green*, 6 N. D. 48, 68 N. W. 318.

A promise to do nothing more than one is already legally bound to do is no consideration. *Ibid*.

The allegations in the answer do not constitute any defense. Rev. Codes 1905, § 6858.

It is improper to allow an amendment to a pleading, which sets up a new and different cause of action from that originally pleaded. *Woodward v. Northern P. R. Co.* 16 N. D. 38, 111 N. W. 627.

An amended answer changing the defense and alleging fraud should not be allowed. *Haag v. Burns*, 22 S. D. 51, 115 N. W. 104.

The right to amend must be timely asserted and claimed. 31 Cyc. 394-396.

If the entire pleading fails to state a cause of action, no amendment

so as to state a cause is permissible. 31 Cyc. 407, and note 76, 409, 423; *Mares v. Wormington*, 8 N. D. 329, 79 N. W. 441.

There must be a valid and sufficient consideration to support an agreement for an extension, and such must be pleaded. This rule also applies to a waiver. 7 Cyc. 897, 900; 8 Cyc. 178, and note 36; 9 Cyc. 347, 349; *Gaar, S. & Co. v. Green*, 6 N. D. 48, 68 N. W. 318.

Estoppel is not raised by inference or argument. It must rest on facts and the facts must be pleaded and proved. 16 Cyc. 748, and note 42.

Mere silence at a time when there is no occasion to speak does not constitute a waiver, nor is it evidence from which a waiver may be inferred. 40 Cyc. 261-263.

Waiver must be proved by the party claiming it, by such evidence as well not leave the matter in doubt or uncertain. 40 Cyc. 269.

Conduct that misleads no one is not a waiver. *People ex rel. McBride v. Atchinson*, 68 Misc. 115, 123 N. Y. Supp. 577; 40 Cyc. 269.

To constitute estoppel, the representation must be such as to induce a man of ordinary prudence to act therein. *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121.

A person is not estopped by his silence, where there is no positive duty to speak. *Bramble v. Kingsbury*, 39 Ark. 131; *Terre Haute & S. E. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164; *Viele v. Judson*, 82 N. Y. 32.

Nor can the meaning of a representation be enlarged so as to create an estoppel. 7 Am. & Eng. Enc. Law, 24; *Henry v. Gilliland*, 103 Ind. 177, 2 N. E. 360; *Haugen v. Skjervheim*, 13 N. D. 616, 102 N. W. 311; *Irvin v. Nashville, C. & St. L. R. Co.* 92 Ill. 103, 34 Am. Rep. 116.

The commencement of foreclosure of a mortgage, where the notice shows that the entire sum is claimed to be due, is sufficient notice of election to declare the whole sum due, without previous notice to the mortgagor. 27 Cyc. 1524; *Hodgdon v. Davis*, 6 Dak. 21, 50 N. W. 478; *Brown v. McKay*, 151 Ill. 315, 37 N. E. 1037; *Owen v. Occidental Bldg. & L. Asso.* 55 Ill. App. 347; *Fowler v. Woodward*, 26 Minn. 347, 4 N. W. 231; *Swearingen v. Lahner*, 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431; *Hawes v. Detroit*

F. & M. Ins. Co. 109 Mich. 324, 63 Am. St. Rep. 581, 67 N. W. 329.

Acceptance of interest due does not waive the default in payment of matured instalments of principal. *Northwestern Mut. L. Ins. Co. v. Butler*, 57 Neb. 198, 77 N. W. 667; *National L. Ins. Co. v. Butler*, 61 Neb. 449, 87 Am. St. Rep. 462, 85 N. W. 437.

Respondent's foreclosure was timely begun. *Wheeler & W. Co. v. Howard (C. C.)* 28 Fed. 741; *Fletcher v. Dennison*, 101 Cal. 292, 35 Pac. 868; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

There was no express waiver, and had there been, it would be without consideration. *Baldwin Invest. Co. v. Bailey*, 45 Neb. 580, 63 N. W. 847; *Post v. Industrial Land Development Co.* — N. J. Eq. —, 34 Atl. 137; *Smith v. Hooton*, 3 Pa. Dist. R. 250; *Hewett v. Dean*, 3 Cal. Unrep. 385, 25 Pac. 753.

There was no waiver by inference or implication. 27 Cyc. 1532.

There was no dedication to the public of any part of the land conveyed. A mere permissive use by the public, of a piece of ground used by one's self in his business, is no dedication. *Chicago v. Chicago, R. I. & P. R. Co.* 152 Ill. 561, 38 N. E. 768; *Weiss v. South Bethlehem*, 136 Pa. 294, 20 Atl. 801; *Frankford & S. P. City Pass. R. Co. v. Philadelphia*, 175 Pa. 120, 34 Atl. 577; *Com. v. Philadelphia & R. R. Co.* 135 Pa. 256, 19 Atl. 1051.

A mere courtesy can never grow or ripen into a right. *Harper v. Dodds*, 3 Ill. App. 331; *State v. Tucker*, 36 Iowa, 485; *Witter v. Harvey*, 1 M'Cord, L. 67, 10 Am. Dec. 650; *People v. Livingston*, 27 Hun, 105; *Root v. Com.* 98 Pa. 170, 42 Am. Rep. 614; *State v. Green*, 41 Iowa, 693; *Jones v. Phillips*, 59 Ark. 35, 26 S. W. 386; *Sharp v. Mynatt*, 1 Lea, 375; *Com. v. Kelly*, 8 Gratt. 632; *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 511, 23 S. E. 582; *Cooper v. Monterey County*, 104 Cal. 437, 38 Pac. 106, 311; 19 Am. & Eng. Enc. Law, 105, 367; *State v. Mitchell*, 58 Iowa, 567, 12 N. W. 598; *Speir v. New Utrecht*, 121 N. Y. 420, 24 N. E. 692; *Durgin v. Lowell*, 3 Allen, 398; *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Stewart v. Frink*, 94 N. C. 487, 55 Am. Rep. 619; *Silva v. Spangler*, 5 Cal. Unrep. 277, 43 Pac. 617; *Kyle v. Logan*, 87 Ill. 64; *Fisk v. Havana*, 88 Ill. 209; *Chicago v. Chicago, R. I. & P. R. Co.* 152 Ill. 561, 38 N. E. 768;

5 Am. & Eng. Enc. Law, 402; Gowen v. Philadelphia Exch. Co. 5 Watts & S. 141, 40 Am. Dec. 489; Stacey v. Miller, 14 Mo. 478, 55 Am. Dec. 112; Boeres v. Strader, 1 Cin. Sup. Ct. Rep. 57; Griffin's Appeal, 109 Pa. 150; Ramthun v. Halfman, 58 Tex. 551; Niles v. Los Angeles, 125 Cal. 572, 58 Pac. 190; Williams v. New York & N. H. R. Co. 39 Conn. 509; Hemingway v. Chicago, 60 Ill. 324; Illinois Ins. Co. v. Littlefield, 67 Ill. 368; State v. Tucker, 36 Iowa, 485; White v. Bradley, 66 Me. 254; Hutto v. Tindall, 6 Rich. L. 396; Fox v. Virgin, 11 Ill. App. 513; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520; Verona v. Allegheny Valley R. Co. 152 Pa. 368, 25 Atl. 518; City Cemetery Asso. v. Meninger, 14 Kan. 312; State v. Nudd, 23 N. H. 327; Saulet v. New Orleans, 10 La. Ann. 81; Morgan v. Lombard, 26 La. Ann. 462; Cyr v. Madore, 73 Me. 53; Bowman v. Wickliffe, 15 B. Mon. 84; Beall v. Clore, 6 Bush, 676; Harding v. Hale, 61 Ill. 192; Nelson v. Madison, 3 Biss. 244, Fed. Cas. No. 10,110; Curtis v. La Grande Hydraulic Water Co. 20 Or. 34, 10 L.R.A. 484, 23 Pac. 808, 25 Pac. 378, and cases cited; 13 Cyc. 483, 488, and cases cited; Lewis v. Portland, 25 Or. 133, 22 L.R.A. 736, 42 Am. St. Rep. 772, 35 Pac. 256; Irwin v. Dixon, 9 How. 10, 13 L. ed. 25; Hogue v. Albina, 20 Or. 182, 10 L.R.A. 673, 25 Pac. 386; Steele v. Sullivan, 70 Ala. 589; Chicago v. Stinson, 124 Ill. 510, 17 N. E. 43; Talbott v. Grace, 30 Ind. 389, 95 Am. Dec. 703.

The acts of the owner are always competent on the question of intent to dedicate. *Re Hand Street*, 52 Hun, 206, 5 N. Y. Supp. 158; 13 Cyc. 473, 474; *Starr v. People*, 17 Colo. 458, 30 Pac. 64.

In foreclosure suit, uncertain and unliquidated damages will not be allowed as an offset. *Hattier v. Etinaud*, 2 Desauss. Eq. 570.

FISK, J. Action to foreclose a mortgage upon certain real property in the city of Jamestown. The mortgage was given to secure deferred payments on the purchase price of the property, which was sold by plaintiff to the defendant at the agreed price of \$32,500, defendant paying \$10,000 in cash at the time of his purchase, and giving four promissory notes, three for \$5,000 each, and one for \$7,500, payable in one, two, three, and four years respectively, which notes are dated April 1, 1910.

The complaint is in the usual form, and the amended answer upon

which the case was tried contains a qualified general denial, admitting the execution and delivery of the notes aforesaid, and also the mortgage sought to be foreclosed. It is also therein admitted that plaintiff is the owner and holder of the notes, and that no part thereof has been paid except the interest due October 1, 1910, and April 1, 1911. Then follow certain allegations of evidentiary matters claimed to constitute a waiver by plaintiff of the strict terms of the mortgage, and of his right to declare the whole sum due thereunder in case of default in the payment of an instalment of the indebtedness. Such answer also contains three alleged counterclaims. By the first, defendant seeks to recover from plaintiff the sum of \$2,000 as damages for alleged fraud, deceit, and misrepresentations respecting the condition and repair of the building and heating plant therein, on the property purchased. By the second counterclaim defendant seeks to recover from plaintiff the sum of \$10,000 as damages for the breach of an express covenant in the deed executed and delivered by plaintiff to defendant of such property, warranting title in fee and free from encumbrances, it being alleged that there was a breach of such covenant because of an alleged easement in the public in certain of the property as an alley or passage way. The third counterclaim is the same as the second, with the exception that it is based upon the breach of an alleged implied covenant in such deed, that plaintiff was the owner of and had the right to convey the fee-simple title of said property to defendant.

Plaintiff had judgment in the court below for the full relief prayed for, and defendant has appealed to this court, and demands a trial *de novo* of the entire case.

After a careful consideration of the record and of the briefs and arguments of counsel, we are agreed that the trial court correctly found the facts in respondent's favor upon all the issues. Indeed, as we view the record, there is no serious conflict in the testimony, the facts being practically undisputed. It is equally clear, we think, that the lower court correctly decided all questions of law. The judgment appealed from must, therefore, be affirmed, and it only remains for us to briefly state our reasons for such conclusion.

As before stated, the notes bear date April 1, 1910, and were given as part payment of the purchase price of the property covered by the mortgage. These notes each bear interest at the rate of 6 per cent per an-

num, payable semiannually. The first instalment of interest, amounting to \$675, became due October 1, 1910, and was paid about that date. The second instalment of interest and the first note of \$5,000 became due April 1, 1911, but defendant failed to pay the same or any part thereof, but on March 31, 1911, he telegraphed plaintiff, stating that he could not meet such instalments on April 1st, and asked for an extension of ninety days in which to pay the same. On the next day, April 1, 1911, plaintiff wired defendant in reply that if he, defendant, wired plaintiff on Monday, April 3d, that he had paid the taxes and had mailed the plaintiff a draft for the interest then due, he would extend the time of payment of the \$5,000 note then due, as requested by defendant. Defendant admits that he did not comply with the offer thus made, but mailed a check for such interest, dating the same sixty days ahead. This check reached plaintiff at Los Angeles, California, about April 11th, and plaintiff declined its acceptance, returning the same, and informing defendant that since he did not accept plaintiff's offer of date April 1st, such offer was withdrawn, and defendant was then notified that unless the interest and principal due on April 1, 1911, were paid at once, foreclosure proceedings would be commenced. In plaintiff's letter to defendant conveying such information he also made another offer to the effect that if defendant would pay the sum of \$2,500 and interest at once, he (plaintiff) might accept it and give defendant until July 1, 1911, in which to pay the remainder of such instalment, to wit, \$2,500. Plaintiff also stated in such letter that "if you want to save expense you will have to act very promptly, as I am now arranging with an attorney for foreclosure." Defendant did not accept this proposition, but on April 17, 1911, replied by letter, stating that it was impossible for him to comply with it, and asking for an extension for thirty days. No reply was made by plaintiff to this letter. It is not contended that any other communications were had between these parties relative to the extension of time for the payment of such instalment. Concededly, defendant never accepted either of the propositions made by the plaintiff, nor did he comply with either of plaintiff's offers aforesaid. On April 20, 1911, defendant mailed plaintiff a draft for the interest due April 1st, but did not pay any of the instalment of principal then due. Upon such failure of defendant to accept or comply with plaintiff's offer contained in his letter of

April 11th, plaintiff began foreclosure proceedings by advertisement, the first publication of the notice of sale being on May 1, 1911. On June 3d, defendant presented an affidavit to the district court, setting forth that he had been granted an extension of time for the payment of such instalment, and praying for an order restraining foreclosure by advertisement, whereupon the district court enjoined such foreclosure, and required further proceedings to be had by action in the district court. Thereafter, and on July 3d, this action was commenced. The record discloses that defendant at no time has offered to pay or tender any portion of the indebtedness thus due, and at the present time the entire sum of \$22,500, with interest, is due and payable.

The mortgage contains the usual stipulation that "if default be made in the payment of said sum of money, or the interest, or the taxes, or said sums paid for insurance, or any part thereof, at the time and in the manner hereinbefore or hereinafter specified for the payment thereof," it shall be lawful for the party of the second part to foreclose and sell the premises, etc. It further provides that "if default be made by the party of the first part (the mortgagor) in any of the foregoing provisions, it shall be lawful for the party of the second part, his heirs, executors, administrators, or assigns, or his attorney, to declare the whole sum above specified to be due."

It is entirely plain to us that defendant has wholly failed, either to properly allege or prove facts showing any extension of time for the payment of the instalment due on April 1, 1911, and it is equally clear that he has failed to allege or prove any facts to warrant the court in holding that plaintiff waived his strict legal rights under the mortgage, or is in any way estopped from asserting such rights in this action. The proof falls far short of establishing a waiver, either express or implied, of plaintiff's rights under the mortgage. The communications passing between these parties furnish conclusive proof that there was no intention on respondent's part to waive any of his rights under the mortgage, either to foreclose or to declare the whole sum due. Nor does the evidence disclose any acts or conduct on respondent's part from which it can be successfully contended that an implied waiver of such rights took place. Respondent at all times asserted his right to foreclose the mortgage, and in his last communication to appellant the latter was clearly informed of the contemplated foreclosure proceedings. De-

fendant could not possibly have understood from the communications of plaintiff that he intended to or did waive his strict legal rights under the mortgage. It is elementary that a waiver can take place only by the intention of the party, and such intention must be clearly made to appear. 40 Cyc. 261-263. Plaintiff's failure to reply to defendant's last communication did not justify defendant in the belief that plaintiff had waived his rights. Plaintiff was not bound to make any reply. He had already spoken most emphatically in his last communication to appellant, stating, as we have above observed, that "if you want to save expense you will have to act very promptly, as I am now arranging with an attorney for foreclosure." Upon the question of waiver see also 40 Cyc. 269, and *People ex rel. McBride v. Atchinson*, 68 Misc. 115, 123 N. Y. Supp. 577.

Appellant does not contend that there is any proof of plaintiff's intention to grant an extension of time for the payment of such instalment, or that plaintiff intended to waive any of his rights under the mortgage, but he asserts that appellant believed that such extension and waiver would be granted. In other words, he invokes the rule of estoppel, but it is perfectly clear from the record that no such estoppel has been established. Defendant, as a reasonable person, had no right to assume or believe that plaintiff would grant any concessions to him other than upon the terms of his offer, which were very explicit, and, concededly, defendant did not comply therewith. As to what is essential to create an estoppel see *Haugen v. Skjervheim*, 13 N. D. 616, 102 N. W. 311.

Plaintiff's exercise of his election to declare the entire sum due on account of the default in the payment of the first instalment was, we think, sufficient. 27 Cyc. 1524; *Hodgdon v. Davis*, 6 Dak. 21, 50 N. W. 478; *Brown v. McKay*, 151 Ill. 315, 37 N. E. 1037. We refrain from citing other authorities, for the rule is well settled, and the authorities from numerous states are collected in 27 Cyc. 1524. We quote from the text from Cyc. as follows: "If the mortgage itself requires that the mortgagor shall be notified of the mortgagee's election and determination to make the entire indebtedness fall due upon a partial default, some explicit and sufficient form of notice will be required. But in the absence of such a provision no notice to the mortgagor is necessary, nor any demand of payment before suit; the

commencement of a suit for foreclosure of the entire mortgage is a sufficient declaration of the mortgagee's intention, and is all the notice to which the mortgagor is entitled."

The acceptance by plaintiff of the draft for past-due interest did not operate as a waiver by him of the default in the payment of the past-due instalment note. This was expressly held by the supreme court of Nebraska in *Northwestern Mut. L. Ins. Co. v. Butler*, 57 Neb. 198, 77 N. W. 667, where the court said: "That a payment of interest had been received after such default did not constitute a waiver of the right to enforce for the defaults in the payments of instalments of principal."

We deem it wholly unnecessary, as well as useless, to add anything further with respect to the alleged defenses urged by appellant, and we will now briefly notice the counterclaims.

We are forcibly impressed from this record that these alleged counterclaims were not interposed in good faith. The original answer in the case was merely a general denial, and the counterclaims were interposed at the commencement of the trial in a second amended answer. The first counterclaim apparently was abandoned before the briefs were prepared, for it is not argued in such brief, and we need not notice the same. The second and third counterclaims were practically abandoned at the argument of the case in this court, and no extended notice thereof need be taken. These counterclaims are assumed to be predicated upon the fact of an implied dedication to the public of an easement over the east portion of lot 9, being one of the four lots mortgaged. There is no foundation whatever in the evidence for such claim, and while the burden of proof to establish such fact was with the defendant, his counsel does not seriously contend that there is any evidence to establish such dedication. It will therefore serve no purpose to consider the many authorities cited in the briefs pertaining to the question of implied dedications of real property, and we shall refrain from so doing. Suffice it to say that, after a careful consideration of the various contentions of appellant and the authorities cited in support thereof, we are entirely agreed that such contentions are devoid of merit, and we have no hesitation in concluding that the decision of the trial court was in all particulars correct. It follows that the judgment appealed from must be, and the same is hereby affirmed.

THE STATE OF NORTH DAKOTA v. C. O. BORSTAD.

(147 N. W. 380.)

Removal of public officers — remedy — special practice.

1. The proceedings provided for in § 9646, Rev. Codes 1905, for the removal of public officers by accusation, are of a character which is peculiar to themselves, and the remedy is one in which the legislature has seen fit to provide a special practice which governs in such proceedings only.

Remedy — summary — protection of the public — incompetent officials.

2. The legislature in enacting § 9646, Rev. Codes 1905, intended to provide a remedy which should be summary in its nature, and which, by avoiding technical delays, might serve to protect the public from the acts of incompetent or dishonest officials.

Due process of law — administration of justice.

3. The due process of law which is provided in § 9646, Rev. Codes 1905, only recognizes those rules of procedure which are fundamental in their nature and essential to the administration of justice.

Demurrer — pleading — unauthorized.

4. No demurrer is contemplated or authorized by § 9646, Rev. Codes 1905.

Evidence — objection to introduction — real merits of the case — improper joinder of parties — will not lie — issues — separate trial.

5. Under § 9646, Rev. Codes 1905, an objection to the introduction of any evidence under the accusation can only be sustained where the defects which are complained of affect the real merits of the controversy and the real and fundamental rights of the defendant. It will not lie for a mere improper joinder of parties defendant and issues affecting such parties, where these issues and parties have been eliminated by the granting of a motion for a separate trial.

Examination of adverse party — right of — incriminating testimony — exemption from giving — privilege must be asserted and claimed.

6. Under the proceedings authorized by § 9646, Rev. Codes 1905, an examination of the adverse party upon the trial may be had under § 7252, Rev. Codes 1905, as amended by chap. 4, Laws of 1907, provided, however, that the right of the defendant to refuse to testify as to matters which might tend to render him liable to prosecution in a criminal action is recognized and preserved. This

Note.—The authorities on the question of the right to remove officers summarily, generally, are reviewed in a note in 15 L.R.A. 95. Upon the question of the power of a town or municipality to remove officer in absence of statutory authority, see notes in 9 L.R.A.(N.S.) 572, and 39 L.R.A.(N.S.) 519.

privilege, however, is a privilege which must be specifically asserted and relied upon by the defendant.

County commissioners — charges — per diem fee for going to and returning from meetings — unlawful — ground for removal.

7. A board of county commissioners have no right or authority to charge a *per diem* for time spent in going to and from the meetings of the board; and the charging of such a fee is a ground for removal from office under § 9646, Rev. Codes 1905.

County commissioners — overseers of the poor — per diem.

8. Although § 1851, Rev. Codes 1905, makes the county commissioners of the several counties overseers of the poor, such commissioners, when acting as such overseers, are only entitled to the *per diem* of two dollars (\$2) provided for by § 1868, and not to the *per diem* of four (\$4) and five dollars (\$5) provided for by § 2613, Rev. Codes 1905, and chapter 119 of the Laws of 1911.

County commissioners — visiting neighboring county — care of poor — overseer of the poor — per diem.

9. A visit of a county commissioner to a neighboring county for the purpose of trying to arrange for the care of the poor of his district in such neighboring county is a visit as an overseer of the poor, and not as a county commissioner, and the *per diem* of an overseer of the poor can only be charged therefor.

Seed grain law — county commissioner — charges — services — applications for seed.

10. Chapter 210 of the Laws of 1909, commonly known as the seed grain law, gives to a county commissioner no right to charge for services rendered in receiving applications for loans of seed grain, or for collecting the sums due to the county therefor, or in protecting the liens of the county. Nor is such charge warranted by the fact that § 2401, Rev. Codes 1905, as amended by chap. 118, Laws 1911, make it the duty of such commissioners to "superintend the fiscal affairs of the county."

Officers — removal — charging illegal fees — proof — degree of — reasonable doubt.

11. To justify a removal from office under § 9646, Rev. Codes 1905, for charging illegal fees, it is not necessary to prove the fact of such charging beyond a reasonable doubt.

Illegal charges — services outside of office — removal.

12. Where a member of a board of county commissioners charges illegal fees while in office and in his reports as such officer, he will not be allowed to say that such fees, though illegal and unwarranted, were for services outside of his office, and that the charging thereof is therefore not a ground for removal under § 9646, Rev. Codes 1905.

Opinion filed April 30, 1914.

Appeal from the district court of Williams County, *Leighton, J.*

Action to remove from office under § 9646, Rev. Codes 1905. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement by BRUCE, J.

This is an accusation under § 9646 of the Revised Codes of 1905, in which the appellant and defendant, C. O. Borstad, is charged with collecting illegal fees for services rendered in his office as a member of the board of county commissioners of Williams county, North Dakota, and his removal from such office is sought for these reasons. A demurrer was interposed to this accusation, which was overruled, as well as an objection to the introduction of any evidence thereunder. A jury trial was then had, and a verdict rendered, finding appellant guilty as charged in the accusation. This appeal is taken from an order denying a motion for a new trial.

Palmer, Craven & Burns, and D. C. Greenlief, for appellant.

There was an improper joinder of several causes of action, not contemplated by the statute. Rev. Codes 1905, § 9646.

The state had no right to call and cross-examine the defendant, as an adverse party, as is permitted in a civil action. The action is penal in its nature. *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Lees v. United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435; *Triplett v. Munter*, 50 Cal. 644; *Minnehaha County v. Thorne*, 6 S. D. 449, 61 N. W. 688; 17 Cyc. 233.

The charges made on outside trips were not "charges and collections of illegal fees for services rendered in his office," as the court erroneously charged the jury. *State v. Bauer*, 1 N. D. 273, 47 N. W. 378; *Law v. Smith*, 34 Utah, 394, 98 Pac. 300; Rev. Codes 1905, § 2613.

The state in such an action must establish its case by evidence amounting to more than a fair preponderance. 2 Enc. Ev. 785, 787.

In such cases the burden of proof does not shift to defendant at any stage of the trial. 2 Enc. Ev. 779, 787.

U. L. Burdick, State's Attorney, Williams County, for respondent (*H. W. Braateliën*, of counsel).

This defendant was not tried upon or for any wrongs which may have been committed by any other of the members of the board. Rev. Codes 1905, §§ 7012, 9536; *State ex rel. Smith v. Leon*, 66 Wis. 199, 28 N. W. 140.

A demurrer does not lie in any such proceeding. *Myrick v. McCabe*, 5 N. D. 422, 67 N. W. 143.

In such case defendant may be called and cross-examined as an adverse party, under the statute. *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524 (Distinguished).

This is in no sense a criminal action, and the cross-examination of defendant as an adverse party was proper. N. D. Code § 9646; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111; *Hays v. Young*, 6 Idaho, 654, 59 Pac. 1113; *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680; *Hays v. Simmons*, 6 Idaho, 651, 59 Pac. 182; *Fuller v. Ellis*, 98 Mich. 96, 57 N. W. 33.

The right to cross-examine in cases where permitted by statute is for the benefit of the public. *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487; *Skeen v. Chambers*, 31 Utah, 36, 86 Pac. 492; *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; *Royall v. Thomas*, 28 Gratt. 130, 26 Am. Rep. 335; *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680.

A county commissioner cannot make such charges, and then claim they were not incurred while acting as such official. *Skagit County v. American Bonding Co.* 59 Wash. 1, 109 Pac. 199; *State v. Bauer*, 1 N. D. 273, 47 N. W. 378.

The duties of county commissioners are fixed and defined by statute, and it is not the province of the court to entertain a change. *State ex rel. Walklin v. Shanks*, 25 S. D. 55, 125 N. W. 122; *Green v. Okanogon County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457; *Merrick County v. Batty*, 10 Neb. 176, 4 N. W. 959; *Erskine v. Steele County*, 4 N. D. 345, 28 L.R.A. 645, 60 N. W. 1050; *Wheeler v. Wayne County*, 132 Ill. 599, 24 N. E. 625.

BRUCE, J. (after stating the facts as above). The first point raised by appellant is that the court erred in overruling the demurrer and the objection to the introduction of any evidence under the accusation. The accusation accused the appellant and four other commissioners with charging and collecting illegal fees. Defendant and appellant contends that several separate causes of action against several commissioners were united, and that no such joinder is authorized and contemplated by § 9646, Rev. Codes 1905, under which the proceedings were brought.

The proceedings provided for in § 9646, Rev. Codes 1905, are neither civil nor criminal, but of a character peculiar to themselves. The remedy is one "in which the legislature has seen fit to provide a special practice which governs in such proceeding only, and is not elsewhere used, either in civil actions or in special proceedings, so called. The legislature creating this remedy has seen fit to borrow a few features only of the procedure which governs in civil actions, but the whole of such procedure has not been incorporated in this statute." The act, indeed, establishes its own due process of law. *Myrick v. McCabe*, 5 N. D. 422, 67 N. W. 143; *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487; *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680; *Fuller v. Ellis*, 98 Mich. 96, 57 N. W. 33. The object of the statute is to protect the public from corrupt officials, and not to punish the offenders. *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680. The right of the legislature to act in the matter arises from the exigencies of government, and is to be found in its inherent power to act upon all subjects of legislation, subject only to constitutional restrictions. There are to be found in the Constitution of North Dakota no provisions which forbid a special procedure in such matters.

In the new process of law that is prescribed, there is no insistence upon the strict rules of practice which prevail in either civil or criminal actions. The intention of the legislature seems to have been that the remedy should be summary, and that all technicalities should be waived. It seems, indeed, to have contemplated a speedy hearing, in order that the public might be protected from incompetent or dishonest officials, and that only those rights of established procedure should

be recognized which are fundamental in their nature and essential to the administration of justice. *Myrick v. McCabe*, 5 N. D. 422, 67 N. W. 143. No demurrer to the accusation seems to have been contemplated, as its interposition would necessitate delay. *Ibid*.

Nothing is said in the statute or in the case of *Myrick v. McCabe*, *supra*, in regard to an objection to the introduction of any evidence under the accusation. We believe, however, that the same reasoning and principles apply, and that in this matter, as in the case of the demurrer, we must bear in mind the fact that the affording of a summary and speedy relief was a controlling part of the legislative intention. For these reasons we believe and hold that an objection to the introduction of any evidence under the accusation should be allowed and sustained where it affects the real merits of the controversy and the real and fundamental rights of the defendants. It should not be sustained where the only defects complained of are an improper joinder of parties defendant and of issues involving different parties, and those defects have, as in the case at bar, been cured and eliminated from the proceedings by the granting of a motion for a separate trial. It is claimed, it is true, that the mere making of such a request has a tendency to prejudice the movant by arousing the hostility of the other defendants. It is difficult, however, for us to see how the separation of the issues by a motion for a separate trial would evoke the enmity of the other wrongdoers, any more than a separation of such issues by a demurrer or by an objection to the admission of evidence under the complaint, based upon the ground of an improper joinder of parties. In the case at bar, also, it is by no means unworthy of consideration that the other defendants were not called as witnesses by either side.

Nor do we believe that the trial court erred in permitting the examination of the defendant as an adverse party. The examination was not held prior to the trial, but upon it. It was not a preliminary examination of the adverse party, but an examination of him as a defendant during the trial. It was a denial merely of the right to assert the old common-law privilege of refusing to testify in an action against one's self during the pendency of that trial. Sec. 9646 of the Revised Codes of 1905 provides that the trial shall be conducted in the same manner as a trial by jury in a civil action. There is no question that

in a civil action the defendant can now be compelled to testify. Sec. 7252 provides for the examination of the adverse party upon the trial, and is entirely separate and distinct from § 9646, which provides for an examination before trial. Whether such examination can be had under the proceedings authorized by § 9646 is not necessary for us to determine. It is sufficient to say that the examination can be had under the proceedings authorized by § 7252, as amended by chap. 4, Laws of 1907, provided that in such examination the constitutional right of the defendant to refuse to testify as to matters which may tend to render him liable to prosecution in a criminal action is recognized and preserved. This privilege, however, is a privilege which must be specifically asserted and relied upon, and we find no such assertion in the record before us.

Counsel for appellant takes exception to the court's instruction that the defendant had no right to charge a *per diem* for time spent in going to and from the meetings of the board of commissioners, and that the charging of such fee furnished a ground for removal from office. It is admitted that the instruction is sustained by the decision of this court in the case of State v. Richardson, 16 N. D. 1, 109 N. W. 1026, but counsel asks us to review and overrule that decision. This, however, we can hardly do. Though we may doubt the wisdom and justice of the rule therein announced, and though the opinion was signed by but two justices (the third not participating), its public policy has been affirmed by two legislatures, and it once having been the established law, we now feel that it is for the legislature, and not for us, to overturn it, if overturned it should be.

The opinion in the case of State v. Richardson, indeed, was handed down in November, 1906. In 1911 the statute as construed by that decision was reconsidered and amended by the legislature, and the *per diem* raised from \$4 to \$5. No other change, however, was made in the statute. See chap. 119, Laws 1911. It is quite reasonable to presume, and in fact we must presume, that the legislature of 1911 reconsidered the whole act as construed by the case of State v. Richardson, *supra*, and that the increase of \$1 per day for the *per diem* was made in consideration of the holding in that case. Again and in the legislative session of 1913, a bill was introduced which specifically

provided for a *per diem* fee for time spent in coming from and going to county commissioners' meetings, provided that the commissioner lived more than 20 miles from the county seat. This bill was rejected, though it is quite clear that the whole matter was canvassed and discussed.

The question, indeed, has not only been passed upon in a prior decision of this court, but the public policy and wisdom of that decision has been considered in two legislative sessions, in both of which it has been approved and upheld. It is hardly within our province to now change the rule, even if we desired to do so.

Appellant also objects to the court's instruction that the state was required to prove by a fair preponderance of the evidence that the illegal charges were made, etc. His first claim is that the acts complained of, if illegal at all, were of a criminal nature, and that the proof should have been beyond a reasonable doubt. His next contention is that even if not criminal, they were, if illegal at all, fraudulent in their nature, and, being such, the proof was required not merely to preponderate, but to be clear and convincing, and that the jury should have been so instructed.

In answering the first point, it is sufficient to say that the present proceedings are not strictly criminal in their nature, and the statute has expressly provided that the civil rules of practice shall prevail on the trial.

As far as the charge of fraud is concerned, if such a charge is involved at all, the instruction that the same must be proved by a fair preponderance of the evidence was sufficiently favorable to the defendant, and all that was required under the authorities. All that is necessary, indeed, in civil cases, is that fraud shall be satisfactorily and clearly proved, and the language usually used by the courts is, "by a preponderance of the evidence and to the satisfaction of the jury." This was the clear meaning of the words, "by a fair preponderance of the evidence," which were used by the trial court. Jones, Ev. § 192.

We find no merit in the contention that the charge for the attendance at the association of county commissioners at Fargo, which is conceded was illegal, was not "a charge and collection of illegal fees for services *in his office*," for which the defendant could be removed. It

is sufficient to say that it was presented and allowed as a fee of the office. See *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111.

Nor did the court err in charging the jury that the defendant was not entitled to charge as a commissioner for his visit to Minot for the purpose of seeing if arrangements could not be made with the Ward county board to receive the Williams county paupers at the Ward county poor farm. While on such visit the defendant was acting as an overseer of the poor, under the provisions of article 1 of chapter 24, Rev. Codes 1905, relating to such overseers. As such he was entitled to a *per diem* of \$2, provided for in § 1868, Rev. Codes 1905. He was caring for the poor and seeking to lodge them, the same as if he had gone to a farmer or other person in his own county for the purpose, though even then there is some question as to whether the act was legal under § 1884, Rev. Codes 1905, which prohibits the sending of paupers out of the county. He was certainly not acting as a commissioner under § 1871, Rev. Codes 1905. He was not, in short, negotiating for the purchase of a poor farm, or for the erection of a building upon such poor farm within the county.

Nor did the court err in regard to the charges for purchasing and distributing the seed grain and collecting therefor. It may be that it would have been well for the legislature to have provided for compensation in such cases, and to have made the collection of the liens a special duty of the commissioners. It does not seem, however, to have done so. The seed lien statute, indeed (chap. 210, Laws 1909), seems to limit the duties of the commissioners to the issue and sale of bonds and warrants, the purchase and sale of seed grain and feed, and the examination and adjustment of applications for grain. It is true that § 2401, Rev. Codes 1905, as amended by chap. 118, Laws of 1911, gives to them the general superintendency of the fiscal affairs of the county. This general superintendency, however, can hardly be held to involve the right to perform, or at any rate the right to charge for, services which would more properly belong to the auditor, the treasurer, the state's attorney, and the sheriff. Objection is also taken to the instruction that "if by a fair preponderance of the evidence the state has proved that defendant has charged and collected illegal fees for services performed in his office, then the burden of proof shifts to the de-

fendant, and is upon him to prove that in charging and collecting such fees that said defendant acted honestly and under the belief that he had the legal right to charge and collect the fees in question."

Counsel contends that it devolved upon the state to introduce evidence to show that the charge and collection was made knowingly and intentionally or corruptly, and that even then the burden of proof did not shift to the defendant, but the burden merely of the evidence or of proceeding. Even if we concede that ignorance of the law would be an excuse, and that the instruction was technically erroneous, and by its terminology confused the burden of proof with the duty of proceeding, we can see no prejudice arising therefrom.

The judgment of the District Court is affirmed.

Goss, J., concurring. The majority opinion is somewhat apologetical as to the decision in *State v. Richardson*, 16 N. D. 1, 109 N. W. 1026. That holding is sound and in line with the overwhelming weight of authority. The statute, § 2613, Rev. Codes 1905, upon which the commissioners must base any *per diem* charge in going to and from their board meetings, is there construed, resulting in the only reasonable holding that could have been made, and heed have been given to the language of the statute, discriminating between duties in office and travel in attendance on board meetings. Sec. 2613 reads: "County commissioners shall each be allowed for the time they are necessarily employed in the duties of their office the sum of \$4 per day and 5 cents per mile for the distance actually travelled in attending the meetings of the board, and when engaged in other official duties." By chap. 119, Laws 1911, the *per diem* is increased to \$5 the statute otherwise remaining unchanged. It is noticeable that the statute allows a *per diem* charge while performing duties in office, and an allowance for traveling in attending board meetings. The right of the commissioner to charge *per diem* while *en route* to attend the official meetings of the board is dependent upon whether a commissioner, while so *en route*, is performing official duties. Manifestly he is not. His commissioner duties begin with the convening of the board, and continue so long as the board is in session, and no longer. *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824; *Rankin v. Jauman*, 4

Idaho, 394, 39 Pac. 1111, and Hays v. Simmons, 6 Idaho, 651, 59 Pac. 182. The fact that he is paid a *per diem* "when engaged in other official duties" cannot authorize a charge as for the performance of official duties in merely traveling to attend an official meeting of the board, when no official duties are actually performed. Counsel contend that he was under a duty to attend, which made the time consumed *en route* devoted to performance of official duty, and for which he could charge a *per diem*. Any so-called duty to attend was a mere personal responsibility owing the general public, and not a duty of office. It is similar to the duty of a citizen to qualify after election to office. It is in no sense an official duty. While the legislature, as stated in the majority opinion, have seen fit to increase the salary, but otherwise leave the law relative to compensation unchanged, and this, after the decision of State v. Richardson, would be a strong reason for adhering to the construction of the statute there given, it seems that the statute is plain and susceptible of only the one construction given in State v. Richardson.

That this is a civil action or proceeding is settled by decisions of this court in Myrick v. McCabe, 5 N. D. 422, 67 N. W. 143; Wishek v. Becker, 10 N. D. 63, 84 N. W. 590; State v. Richardson, 16 N. D. 1, 109 N. W. 1026; and Territory v. Sanches, 14 N. M. 493, 94 Pac. 954, and note to same case in 20 Ann. Cas. 109, beginning on page 112, showing such to be the rule in all states except California and possibly Georgia.

The evidence discloses a charge made and fees obtained from the county for attendance by the defendant at a state meeting of county commissioners at Fargo, and there is evidence that such charges were made and fees were received on the advice of the state's attorney that the same was a legal charge against the county. The charge was clearly illegal, and the jury was so instructed, but as the jury could have found the charge was made under the advice of the legal adviser of the board, the question of defendant's intent was properly left to the jury by the instructions.

As to the right of the defendant to fees or for the charge made for receiving applications for seed grain, which is explained to have really been made for time spent in purchasing seed for the county and

distributing it by orders to the needy, the better rule is against the legality of a charge therefor. If the board of county commissioners, as the fiscal, superintending, and administrative board of the county, desires such work done, it should authorize the proper officer, or engage an agent or employee, to do the same, or else, if done by one of their number, make or allow no charge for such services rendered or time spent. When a county commissioner is not acting with the board and as a member thereof he acts as an individual, or, if in behalf of the county, as an agent for the county. Public policy condemns employment by the board of their individual members as county agents, or agents of the board, as to do so is to mingle private interests of the individual commissioner with the performance of his duties in office. They may be presented an inducement to so act officially as to create or perpetuate employment for the individual commissioner, and official duties become apportioned as private jobs. When the point is reached that a member of a board has a private interest in the performance of the board's official business, that moment that individual is disqualified to, with propriety, act officially. *Miller v. Smith*, 7 Idaho, 204, 61 Pac. 824. And for the same reason defendant had no right to make a charge and collect fees for his services in making collection of seed liens or pursuing the county property, as, under the statute (chap. 210, Laws 1909), the county is the owner and has title to and right of possession of the crop sown, raised, and harvested, for which the county has furnished the seed. The court properly instructed the jury on this question.

The record discloses that at the various meetings of the county board, from and including the 15th day of April, 1911, up to and including the 11th day of September, 1911, defendant charged, collected, and received *per diems* for one day in coming to attend the board, and one day returning from the board before and after its adjournment,—in all for eight instances, a charge of fifteen days or \$75 was illegally made, allowed, and collected. On September 25, 1911, the state's attorney filed a written opinion with the board, calling their attention to the fact that it was against the law to make or allow these charges, and requesting that the individual members of the board make restitution to the county of such illegal fees, and the opinion in State

v. Richardson, *supra*, was brought to its attention, ending further allowance of bills of this kind. But the record does not disclose that the county was reimbursed by this defendant.

The evidence also discloses a considerable amount paid for time spent on inspecting roads and highways. The evidence does not disclose whether this board acted jointly as in viewing proposed highways petitioned for, or bridges proposed to be built, or whether the defendant assumed to act as an agent of the board in the instances so charged for. Chap. 19, Political Code of 1905, enumerates the instances in which the board is required to act as a body in such matters, and when so acting they are performing duties, and may charge *per diem* and mileage therefor. Perhaps it has developed into a custom in this state for individual members of the board to act as agents of the board in instances such as are charged for here, but in so doing the commissioner is, instead, performing the duties of county surveyor (§§ 1375-1377), or road supervisor (§§ 1386-1404), or overseer of highways (§ 1410), and not a duty enjoined upon the commissioner.

The authorities are in accord in holding that the making of what is known to be an illegal charge against a county, and the reception of money therefor by a county official, constitute ground for his removal. There is some divergence of opinion as to whether ignorance of the law will excuse the public officer in making a charge and accepting illegal fees under a good-faith belief of right to do so. More or less difference exists in the wording of the various statutes defining grounds for removal by civil action. Where knowledge of the law is conclusively imputed, and the officer cannot be heard to plead ignorance as a justification for the collection of illegal fees, an occasional hardship may be worked, although seldom, as it is a matter of common knowledge that in practice the court or jury tempers justice with mercy in their findings, and hesitates to exact the letter of the bond in the absence of a wrongful or dishonest intent. On the other hand, if ignorance of the law be an excuse, the result is, as is aptly said in *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45, and in *State ex rel. Wynne v. Examining & Trial Board*, 43 Mont. 389, 117 Pac. 77, Ann. Cas. 1912C, 143, "The denser the ignorance, the greater would be the exemption from liability;" and that the rule should be: "The receiving of the il-

legal fees is the gist of the wrong under the statute; and when such fees are deliberately accepted the law is violated." See also note to last-mentioned case, reported in Ann. Cas. 1912C, 143-147. In the instant case the *per diem* charges were made after the decision of State v. Richardson, 16 N. D. 1, 109 N. W. 1026, which case came from a county adjoining Williams. The law was there construed and declared. It is hard to believe that this whole board of commissioners was ignorant of this interpretation of the statute fixing their compensation. The following from Miller v. Smith, 7 Idaho, 204, 61 Pac. 824-827, applies: "If ignorance of the law will excuse such flagrant violations of the law as are shown in this case, the people are at the mercy of ignorant and corrupt officials, and the plea of every dishonest or corrupt official would be ignorance of the law. Officers must be judged by their acts, and not by their plea of ignorance of the plain provisions of the law after its repeated violations which result in their pecuniary or other advantage. . . . The time has evidently come in this state when county commissioners must know their duties and do them." See also annotations in 4 L.R.A. 360; State ex rel. Jackson v. Wilcox, 78 Kan. 597, 19 L.R.A.(N.S.) 224, 130 Am. St. Rep. 385, 97 Pac. 372, and State ex rel. Thompson v. Donahue, 91 Neb. 311, 135 N. W. 1030, and extended note to the same case in Ann. Cas. 1913D, 18-32.

The judgment appealed from should be affirmed.

ALEXANDER McKENZIE, Ruth Rodman, and Amy Rodman v.
CITY OF MANDAN, County of Morton, O. H. Killand, County
Treasurer, and H. H. Harmon, County Auditor.

(147 N. W. 808.)

City ordinance — sewer district — description — sufficiency.

1. A description in an ordinance creating a sewer district, which reads:
"All lots and parts of lots, all blocks and parts of blocks, and all other parcels
of land within the city of Mandan, Morton county, North Dakota, as the same

Note.—As to what property is liable for assessment for construction of drains or sewers, see notes in 58 L.R.A. 353, and 26 L.R.A.(N.S.) 973.

is now platted and recorded in the office of the register of deeds in and for said Morton county, which lies north of the right of way of the Northern Pacific Railway Company, including Mandan Proper, First Northern Pacific Addition to Mandan, Heart View Addition to Mandan, that portion of Mead's Addition to Mandan lying north of said right of way, and all of Helmsworth & McLean's Addition to Mandan, and all of said right of way belonging to the said Northern Pacific Railway Company,"—is held to include that portion of Helmsworth & McLean's Addition which lies south of the railway track, as well as that portion which lies north thereof.

Special assessments — basis of — benefits — inspection — commission.

2. Sec. 2801, Rev. Codes 1905, requires special assessments to be made on the basis of benefits, and of benefits alone. It specifically requires an inspection of the lots or parcels of land by the commission, and a complete list of both the benefits and the assessments to be made.

Commission — benefits — methods — levy of assessments — void — collection enjoined — objections to void assessments — not necessary.

3. If, in seeking to levy an assessment under § 2801, Rev. Codes 1905, the commission neglects to inspect the land and to make, or cause to be made, a complete list of both the benefits and the assessments, or in computing such assessment adopts a method which is unwarranted by the statute, the assessment is void; and property owners will not be precluded from bringing an action in a court of equity to enjoin the collection of the same by the mere fact that they did not appear before the board of commissioners or the city council to object to such assessment.

Assessments — objections to — must be made before commission — suit in equity — legality of methods.

4. Objections to an assessment, which seek to correct errors in judgment and mistakes as to the real amount the property is benefited, must be urged before the commissioners and the city council, and if not so urged, cannot afterwards be relied upon in a subsequent suit in equity to restrain the collection of such assessment. This is not true, however, of objections which involve the legality of the proceedings, and raise the question that the method pursued was contrary to that provided by the statute.

Special assessment commission — action — complaint — sufficiency.

5. A complaint which alleges "that such special assessment commission, in attempting to determine the actual benefits to accrue to the lots and parcels of land in said pretended assessment district by the construction of said sewer, acted arbitrarily and unlawfully and by an inflexible rule, and totally failed and neglected to exercise any discretion; that it did not determine said benefits, if any there were, at the time nor in the manner prescribed by law, but, first determining arbitrarily how much the cost of said sewer and of said trunk line should be borne by each of the lots in said district, and having so deter-

mined the amount to assess against each lot and parcel of land arbitrarily and illegally as aforesaid, and basing the estimate of benefits upon the cost of the sewer and the proportion thereof assessed to each lot and parcel of land, determined that each lot or parcel of land in said district was benefited 50 per cent more than the proportion of cost so assessed; and this, though many of the lots and parcels of land in said sewer district were not benefited at all by said sewer, and some were benefited more than others, and some were so situated that said sewer could not serve them,"—shows and alleges a method of procedure on the part of the commissioners which is not warranted by § 2801, Rev. Codes 1905, and it is illegal.

Ordinance — sewer district — creation of — immaterial matter — surplusage — subject-matter — complete.

6. An ordinance which creates a sewer district is not invalid because it contains a clause to the effect that said district is "created for all purposes of local improvement within the boundaries thereof, contemplated by the provisions of the laws of North Dakota, as laid down in article 18, chapter 30, of the Political Code of 1905." Even if such clause cannot be construed as relating to sewer purposes, merely, it may be stricken from the ordinance as surplusage, and if the said ordinance is otherwise complete and connected in subject-matter, the ordinance may stand and be enforceable after such exclusion.

Ordinance — sewer district — title of — purpose — intention of council.

7. Where an ordinance creating a sewer district contains a provision that the district so established "is so created for all purposes of local improvement within the boundaries thereof, contemplated by the provisions of the laws of North Dakota, as laid down by article 18, chapter 30, of the Political Code of 1905," and the title of the ordinance is "An Ordinance Creating and Establishing Sewer Improvement District Number One, in the City of Mandan, North Dakota, and Defining the Boundaries of the Same," and no other improvement is spoken of in the ordinance but that of a sewer,—the title may be used for the purpose of arriving at the intention of the council, and the said clause may be construed as relating merely to sewer purposes.

Sewers — advertisements for bids — plans — specifications — requirements — warrants — rate of interest — cash cases — mandatory — defects — cured.

8. Sec. 2780, Rev. Codes 1905, as amended by chapter 46 of the Laws of 1907, and which as so amended provides that advertisements for bids for the construction of sewers "shall specify the work to be done, according to the plans and specifications therefor on file in the auditor's office, and shall call for bids therefor upon a basis of cash payment for said work, and state the time within which such bids will be received and within which such work is to be completed. The city council may also require bidders to state the rate of interest the warrants shall bear (not exceeding 7 per cent per annum) which

are to be received and accepted by them at par in payment for such work,"— is mandatory, and must be reasonably complied with in so far as the provision in regard to the bids upon a cash basis and the rate of interest which the warrants shall bear are concerned, though a defect in the advertisement in this respect may be cured by the fact that all of the bids are in fact upon a cash basis, and give the rate of interest which the warrants, if any, shall bear.

Opinion filed May 6, 1914.

Appeal from the District Court of Morton County, *Nichols, J.*

Action to restrain the collection of a special assessment sought to be levied under chapter 62 of the Laws of 1905. Judgment for defendants sustaining a demurrer to the complaint. Plaintiffs appeal.

Reversed.

W. H. Stutsman, for appellant.

Plaintiff's property is not within the sewer district as created by the ordinance, and hence it is not subject to the tax. *Neher v. McCook County*, 11 S. D. 422, 78 N. W. 998; *Dumas v. Doulin*, 1 McGloin (La.) 275; *Hibberd v. Slack*, 84 Fed. 577; *Re Goetz*, 71 App. Div. 272, 75 N. Y. Supp. 750.

The call for bids must require a rate of interest to be stated, and also a cash basis or bid. *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 592; Rev. Codes 1905, §§ 2780 & 2792.

The assessment of benefits was arbitrary, and does not evince the exercise of any judgment; and the assessment itself was based upon the cost of the sewer, and not on the actual benefits. *Watkins v. Zwie-tusch*, 47 Wis. 515, 3 N. W. 35; *Johnson v. Milwaukee*, 40 Wis. 315; *Loewenbach v. Milwaukee*, 139 Wis. 49, 119 N. W. 888; *State ex rel. Shannon v. District Judges*, 51 Minn. 539, 53 N. W. 800; *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 133; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Clapp v. Hartford*, 35 Conn. 66.

The benefits shall be assessed upon the owners in proportion to the advantage which each parcel of land is deemed to acquire by the improvement. *Grand Rapids School Furniture Co. v. Grand Rapids*, 92 Mich. 564, 52 N. W. 1028; *People ex rel. Connelly v. Reis*, 109 App. Div. 748, 96 N. Y. Supp. 597; *People ex rel. Tietjen v. Reis*, 109

App. Div. 919, 96 N. Y. Supp. 601; *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242.

L. H. Connolly, for respondent.

The ordinary rules of grammar will be applied for the purpose of ascertaining the meaning of a statute. These are, however, merely rules of construction, and must yield to the clearly disclosed legislative intent. 36 Cyc. 1117; Rev. Codes 1905, §§ 2771-2773; *State v. Schaffer*, 95 Minn. 311, 104 N. W. 139.

If error was committed, it does not vitiate the proceedings. Rev. Codes 1905, § 2789.

Where the council has regularly reassessed property for street improvements, and has given notice to the owners to file objections to such assessment within a certain time, as by law required, an owner who fails to object cannot afterwards dispute the validity of the assessment. *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353.

The determination of the board of drain commissioners that lands are benefited by a drain is conclusive, except in case of fraud. *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841.

BRUCE, J. This is an appeal from an order sustaining a demurrer to a complaint in which the owners of a tract of land within the limits of the city of Mandan, North Dakota, seek to restrain the collection of a special assessment or sewer tax sought to be levied under chapter 62 of the Laws of 1905.

The first ground urged in favor of the complaint and against the demurrer is that the complaint shows upon its face that the property of the plaintiffs is not included within the sewer district as created by the council. The complaint shows that the plaintiffs' property is situated in or comprises that portion of Helmsworth & McLean's Addition which lies south of the Northern Pacific railway track. It appears that north of the Northern Pacific railway track is an addition known as Heart View Addition to Mandan, another known as Mandan Proper, another known as First Northern Pacific Addition to Mandan, another which is known as Mead's Addition, and also a part of the addition which is known as Helmsworth & McLean's Addition. The

complaint further alleges that that part of Helmsworth & McLean's Addition which lies south of the railroad track, and which is owned by the plaintiffs "was at one time platted as a part of Helmsworth & McLean's Addition to the town of Mandan, but no lots were ever sold out of said tract, and the portion of said platted addition lying south of said Northern Pacific railway was abandoned, and the same has reverted to acreage property, and the same is now occupied and used by the plaintiffs as one tract of land." It is also alleged that "the city of Mandan, as a part of said sewer system, has at great expense (a part of which expense has been illegally and unlawfully assessed against the land of plaintiffs as aforesaid), constructed and now maintains a pumping station for the purpose of pumping sewage and waste from said sewer system into the Heart river at a point above the land of plaintiffs, said land being located between said pumping station and the outlet of said sewer into the Heart river; and at times when said river is high the sewage does not enter into said river, but the waters of said river back into said sewer, and said pumping station is used to force said waters and said sewage back again into said river."

The ordinance under which the sewer improvement district was created described the district as follows: "All lots and parts of lots, all blocks and parts of blocks, and all other parcels of land within the city of Mandan, Morton county, North Dakota, as the same is now platted and recorded in the office of the register of deeds in and for said Morton county, *which lies north of the right of way of the Northern Pacific Railway Company*, including Mandan Proper, First Northern Pacific Addition to Mandan, Heart View Addition to Mandan, that portion of Mead's Addition to Mandan lying north of said right of way, and all of Helmsworth & McLean's addition to Mandan, and all of said right of way belonging to the Northern Pacific Railway Company."

It is urged by counsel for plaintiffs that the land of plaintiffs cannot possibly be embraced within the land described in the ordinance, because a smaller cannot include a greater, and the only construction can be that only that part of Mandan which lies north of the track should be comprehended. We cannot, however, so limit the use of the word "include," or ignore what to us is the plain intention of the ordinance. If the word "including" limits the ordinance so that only that part which is north of the track is embraced, how can "all of said right of way

belonging to said Northern Pacific Railway Company" be embraced? If the smaller portion cannot include the greater, how can this territory be held to be included within the territory north of the track? That it is intended to be included, however, is too clear for argument, and there is no contention on the part of appellants that it was not so intended to be included. So, too, why did the council specifically state that "that part of Mead's Addition lying *north* of said right of way" should be included, specifically describing the part which was north of the track alone, but when it came to speak of Helmsworth & McLean's Addition, speak of it as "*all* of Helmsworth & McLean's Addition." It is true that it is stated that the land is now merely used as acreage property, but it is none the less a part of the addition mentioned.

The next point of appellants is, we believe, well taken, and in itself would justify an overruling of the demurrer and a reversal of the judgment. It is based upon the allegation "that such special assessment commission, in attempting to determine the actual benefits to accrue to the lots and parcels of land in said pretended assessment district by the construction of said sewer, acted arbitrarily and unlawfully and by an inflexible rule, and totally failed and neglected to exercise any discretion; that it did not determine said benefits, if any there were, at the time nor in the manner prescribed by law, but, first determining arbitrarily how much the cost of said sewer and of said trunk line should be borne by each of the lots in said district, and having so determined the amount to assess against each lot and parcel of land, determined that each lot or parcel of land in said district was benefited 50 per cent more than the proportion of cost so assessed; and this, though many of the lots and parcels of land in said sewer district were not benefited at all by said sewer, and some were benefited more than others, and some were so situated that said sewer could not serve them." We deem this allegation sufficient to entitle the plaintiffs to a hearing upon the points therein involved, the action having been brought within the period of six months prescribed by § 2790, Rev. Codes 1905.

No matter what may have been the rule prior to the passage of chapter 62 of the Laws of 1905, there can be no doubt that the legislature in that act put itself clearly on record as requiring all assessments to be made on the basis of benefits, and of benefits alone. It was specific in the matter, so that there could be no evasion and no dispute.

It specifically required an *inspection* of the lots or parcels of land by the commission. It required the commission to make or cause to be made a complete list of both the *benefits* and the assessments, "setting forth each lot or tract of land assessed, and the amount such lot is *benefited* by the improvement and the amount assessed against it." See § 2801, Rev. Codes 1905. It, in fact, required that assessments should not be arbitrarily made, but that the actual benefits, as well as the apportionment of the assessment, should be found and given, to the end that the assessment might not only be in proportion to the benefits, but that the owners and the public might know the actual and proportional basis on which the assessments were levied.

We believe that the plan charged in the complaint to have been pursued in the case at bar is an arbitrary plan, which is absolutely unwarranted by § 2801, Rev. Codes 1905, and which is universally condemned by the authorities where the statutes require the assessments to be levied on the basis of benefits. See *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 133; *Loewenbach v. Milwaukee*, 139 Wis. 49, 119 N. W. 888; *State ex rel. Shannon v. District Judges*, 51 Minn. 539, 53 N. W. 800; *Robertson Lumber Co. v. Grand Forks*, post, 556, 147 N. W. 249.

Nor do we believe that the complaint lacks in equity because it fails to allege that this specific objection was raised before the commissioners or before the council. It is not an objection which involves an error in judgment, but one which is directed to the method by which the assessment was levied. It does not raise the objection that a mistake was made as to the real amount the property was benefited, or that there was a mistake in the computation of the assessment, but it raises the point that the commission had no jurisdiction whatever to levy the assessment because it had failed to comply with the terms of the statute upon which its jurisdiction was based. Such being the case, it was not necessary that the point should have been raised prior to the proceedings in equity. *Robertson Lumber Co. v. Grand Forks*, supra; *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 133; *Watkins v. Zwietusch*, 47 Wis. 515, 3 N. W. 35; *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Milwaukee*, 52 Wis. 98, 8 N. W. 823; *Whitaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590, 592; *Spence v. Milwaukee*, 132 Wis. 669, 113 N. W. 38.

There is no merit in the objection that the ordinance creating the sewerage district is invalid because of § 2, which provides "that the sewer improvement district hereinbefore created and established is so created for all purposes of local improvement within the boundaries thereof, contemplated by the provisions of the laws of North Dakota as laid down in article 18, chapter 30, of the Political Code of 1905." It is argued that this provision is invalid, and that the whole of the ordinance is invalid because chapter 30 of the Political Code relates to sidewalks, paving, and water mains, as well as to sewerage, and that it was not contemplated in said acts that one district should be made for all purposes. It seems quite clear to us, however, that § 2 should be construed as merely relating to "all purposes of local improvement" connected with the sewer in question. The title of the ordinance is "An Ordinance Creating and Establishing Sewer Improvement District Number One, in the City of Mandan, North Dakota, and Defining the Boundaries of the Same." No other improvement is spoken of in the title, and though the title is not a part of an act, it can be used for the purpose of arriving at the legislative intention. If the ordinance were an act of the legislature, all that the court would do, even under the construction of counsel for appellant, would be to strike out § 2 as not being expressed in the title, and would retain the rest of the ordinance, as, even after § 2 has been eliminated the ordinance has enough in it to make it a valid enactment. Its provisions are connected in subject-matter and depend upon each other. They operate together for the same purpose, and are so connected in meaning that it can be presumed that the legislature would have passed the act even without the section just now under criticism. See *Malin v. Lamoure*, ante, 140. 50 L.R.A.(N.S.) 997, 145 N. W. 582, 587; *Cooley*, Const. Lim. 7th ed. 246.

The point is also made that the call for bids did not require the rate of interest to be given, or require the bids to be on a cash basis. Sec. 2780, Rev. Codes 1905, requires that the advertisements for bids "shall call for bids therefor upon a basis for cash payment for said work." This section was amended by chapter 46 of the Laws of 1907, and as amended ran, "shall specify the work to be done according to the plans and specifications therefor upon a basis of cash payment for said work,

and state the time within which such bids shall be received and within which such work is to be completed. The city council may also require bidders to state the rate of interest the warrants shall bear (not exceeding 7 per cent per annum) which are to be received and accepted by them at par in payment for such work." These cash requirements are also emphasized in § 2783, Rev. Codes 1905, as amended by chapter 46, Laws of 1907.

It is clear to us that bids upon a basis of cash payment are required and provided for, even though payment by warrants is contemplated. It is also clear to us that the word "may" in the clause, "may also require the bidders to state the rate of interest," means "must," where the payment is intended to be in warrants, but of course means "may" and is permissive in the sense that the statement of the rate of interest would only be necessary when the payment by warrants was contemplated. The reason for the provision could nowhere be better illustrated than in the case which is before us. The warrants run for twenty years and at 7 per cent. The original contract price was \$46,000. It would have been better for the municipality to have accepted a bid for \$50,000, provided that the warrants had run at 6 per cent, and for a still larger sum if the warrants had run at a lower rate of interest. A deduction of only one per cent in the interest would have made a difference of \$4,400. It can easily be seen that there was a reason for the legislative requirement that the rate of interest required should be given in the bids, and it is clear that competition in the matter of interest is just as essential as competition in the contract price.

Statutory requirements of the nature of those before us must be at least reasonably complied with, and the demurrer therefore should have been overruled. *Robertson Lumber Co. v. Grand Forks*, post, 556, 147 N. W. 249; *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590, 592. We do not say, however, that an assessment is absolutely and necessarily invalidated by an omission in the advertisement to call for bids on a cash basis, and an omission to require a statement of the rate of interest. It may or may not be. We, for instance, believe that if the proposals for bids are in fact on a cash basis, and the rate of interest is in fact given, the error may be cured

by the bids themselves. We believe, however, that the complaint, standing alone, states a cause of action.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings according to law.

THE ROBERTSON LUMBER COMPANY, a Corporation, v. THE CITY OF GRAND FORKS, Hans Anderson as County Auditor of Grand Forks County, N. D., and H. A. Shaw as County Treasurer of Said County.

(147 N. W. 249.)

Special assessments — improvements — statutes — levied — benefits — proportion — measured — area — method — not sole criterion.

1. Where the statute requires special assessments for improvements to be levied in proportion to the benefits conferred, but there is no provision as to the manner in which the benefits shall be measured or ascertained, an assessment according to the area is not necessarily invalid, provided that after a proper inspection it is found that the increased value or benefit is in proportion to that area. The area method, however, should be adopted as a means of arriving at the benefits, and not as the sole criterion thereof.

Special assessments — levied in proportion to benefits — findings.

2. Sec. 2801, Rev. Codes 1905, requires special assessments to be levied in proportion to the benefits conferred. The finding that a certain area will require a certain number of outlets, or can make a certain number of connections with a sewer, is not a finding of the extent to which each lot or area in a given district will be benefited by the improvement.

Special assessment — levying — prerequisite — commissioners — inspection of property — benefit to each parcel of land — determined — list of benefits.

3. Sec. 2801, Rev. Codes 1905, requires as a prerequisite to the levying of an assessment, that the commissioners shall personally inspect the property to be assessed, and shall not only determine the amount in which each lot or parcel of land which is sought to be assessed will be especially benefited, but shall make a complete list of such benefits. Unless these things are first done the commission has no power or authority to levy an assessment, nor has the city council the power to confirm the same. On the hearing before the board of commissioners and the city council, provided for by §§ 2802 and 2803, Rev. Codes 1905, such boards have the power to review and correct errors in judg-

ment and in computation merely. They have no power to act, and their findings are not conclusive in cases where the commissioners have not viewed the property, and have not made any specific findings of the benefits, and have adopted a method of procedure which is unwarranted by the statutes.

Objection — urged before commissioners — city council — failure to do so is no waiver — suit in equity — tax — restraining collection of.

4. An objection that an assessment has been made in a manner which is not warranted by the statutes is not waived by the failure to urge it before the commissioners or the city council, but may be relied upon and urged in a subsequent suit in equity to restrain the collection of the tax.

Necessity — sewers — city council sole judge — general rule — its judgment not conclusive — sewer in good repair — outlying districts.

5. Generally speaking, a city council is the sole judge of the necessity of sewers, and of the efficiency, durability, and adaptability of those already in existence. Its judgment, however, is not conclusive in a case where a sewer is in reasonably good repair and is adequate to carry off the sewage and drainage, both present and prospective, in the district in which it was originally constructed, and the construction of a new sewer is only necessary because of the needs of outlying districts.

Omission of property — assessment district — validity of assessment on each property.

6. The omission of property within an assessment district from the assessment cannot be urged against the validity of the proceedings by one whose assessment is not increased by reason of such omission.

Ordinance — authorized sewer construction — subsequent amendment reducing area — mistake — sewers — construction of — maps properly made and filed — contract let — sewer constructed — ordinance amended to conform — property in area covered — owners — no objection to description — decree — valid assessment.

7. Where, after the passage of an ordinance authorizing the construction of a sewer, an amendment is introduced reducing the area of the sewer district, but by accident or mistake the ordinance as passed increases instead of reduces the area, but plats and maps are filed with the city auditor, properly describing the course of said sewer and said district, and the contract for the construction of the sewer is let in conformity therewith, and after the construction of the sewer and before the levying of the special assessment to pay therefor, the ordinance is amended so as to conform to the proposed and original amendment, a property owner whose property has at all times been included within the areas covered, and who has made no objection based upon the defect of description, either before the commissioners or the city council, is not entitled to a decree in equity setting aside and declaring invalid such assessment.

Statute or charter — ordinances — passed by yea and nay votes — amendment — adoption of — by viva voce vote — validity.

8. Where the statute or charter requires ordinances to be passed by a yea and nay vote, an ordinance is not invalid which is adopted with amendments by a yea and nay vote, even though such amendments may have been adopted by a *viva voce* vote merely.

Objector — equity — special assessment — ordinance — passage of.

9. An objector will not be heard to complain, in an equity proceeding to set aside a special assessment, that the ordinance upon which it was based was placed upon its second reading and final passage by one and the same vote. Such a proceeding is, at the most, irregular.

Opinion filed May 8, 1914.

Appeal from the district court of Grand Forks County, *Templeton, J.*

Suit to restrain the collection of a special assessment. Judgment for defendant.

Reversed.

Statement by BRUCE, J.

This suit was brought by the appellant lumber company to restrain the collection of a special assessment on block 36 of the town of Grand Forks, and which was levied to defray the cost of the construction of a trunk sewer. The validity of the assessment is challenged on the grounds: (1) That plaintiff's property was not benefited by the improvement in question; (2) that no ordinance creating and establishing the improvement district was adopted; (3) that the contract was let in violation of law; and (4) that the assessment was excessive, and was made arbitrarily, and not according to the benefits. These allegations were denied in the answer, and pleas of laches and of estoppel were interposed. The trial court affirmed the validity of the assessment, and from a judgment dismissing the action this appeal is taken. A trial *de novo* is requested.

Scott Rex, for appellant.

The ordinance attempting to create the sewer district involved here was and is fatally defective for want of proper description of the property intended to be included in the district; and such defect is juris-

dictional. *Collier Estate v. Western Paving & Supply Co.* 180 Mo. 362, 79 S. W. 947; *Copcutt v. Yonkers*, 83 Hun, 178, 31 N. Y. Supp. 659; 28 Cyc. 1122; *Whitney v. Hudson*, 69 Mich. 189, 37 N. W. 184; *German Sav. & L. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; *Thomason v. Cuneo*, 119 Cal. 25, 50 Pac. 846; *Raymond v. Cleveland*, 42 Ohio St. 527; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90.

All statutory requirements must be strictly complied with, and the attempted amendment of the ordinance subsequently did not materially alter its original form and substance. No notice was given the public. Property owners have a right to appear and be heard. Council cannot validate its former void proceedings by an act of *ex post facto* legislation. *Bennett v. Emmetsburg*, 138 Iowa, 67, 115 N. W. 582; *Comstock v. Eagle Grove*, 133 Iowa, 589, 111 N. W. 51; *Mason v. Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770; *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734; *McLauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710.

There was no effort to ascertain comparative values of property and benefits, either as to property omitted or property included, in levying the assessment to which objection is made. *Hassan v. Rochester*, 67 N. Y. 528; *Simmons v. Millville*, 75 N. J. L. 177, 66 Atl. 895; *State, Schlapfer, Prosecutor, v. Union*, 53 N. J. L. 67, 20 Atl. 894; 25 Am. & Eng. Enc. Law, 1199, and cases cited; 28 Cyc. 1162, and cases cited; *Copcutt v. Yonkers*, 83 Hun, 178, 31 N. Y. Supp. 659; *Masters v. Portland*, 24 Or. 161, 33 Pac. 540; *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139; *State ex rel. Scotten v. Brill*, 58 Minn. 152, 59 N. W. 989; *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W. 141, 3 Ann. Cas. 7; *Cooley, Taxn.* 3d ed. 1179.

In ascertaining benefits, the assessment commission must have knowledge of all material facts; and its determination, in order to be sustained, must be the result of a deliberate exercise of knowledge, discretion, and fairness. *People ex rel. Keim v. Desmond*, 186 N. Y. 232, 78 N. E. 857; *State, Frevert, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773; 28 Cyc. 1156, 1161; *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W.

141, 3 Ann. Cas. 7; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

With physical facts before it to show to the contrary, this court will not consider as a fact, that which is on its face most plainly not a fact. *Bailey v. Sioux Falls*, 28 S. D. 118, 132 N. W. 703; *Power v. Helena*, 43 Mont. 336, 36 L.R.A.(N.S.) 39, 116 Pac. 415.

This assessment is not based on benefits, but on the number of openings that a property would need to get the benefit from the sewer—the area value. It evinces a want of knowledge, deliberation, and the exercise of a proper discretion, and adapts an arbitrary basis. 28 Cyc. 1168; *State ex rel. Powell v. District Ct.* 47 Minn. 406, 50 N. W. 476; *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 133; *State ex rel. Wheeler v. District Ct.* 80 Minn. 293, 83 N. W. 183; *Hayes v. Douglas County*, 92 Wis. 429, 31 L.R.A. 213, 53 Am. St. Rep. 926, 65 N. W. 482; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35; *People ex rel. Keim v. Desmond*, 186 N. Y. 232, 78 N. E. 857; *State, Frevert, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90; *Johnson v. Milwaukee*, 40 Wis. 315; *Liebermann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112; *Auditor General v. O'Neill*, 143 Mich. 343, 106 N. W. 895; *Lawrence v. Grand Rapids*, 166 Mich. 134, 131 N. W. 581; *Auditor General v. Bishop*, 161 Mich. 117, 125 N. W. 715; *Loewenbach v. Milwaukee*, 139 Wis. 49, 119 N. W. 888; *Chicago, M. & St. P. R. Co. v. Janesville*, 28 L.R.A.(N.S.) 1160, subdiv. IX. of case note and cases cited; *Cooley, Taxn.* 3d ed. 1254; *Kirst v. Street Improv. Dist.* 86 Ark. 1, 109 S. W. 526; *Essen v. Cape May*, 77 N. J. L. 361, 72 Atl. 49; *Hanseom v. Omaha*, 11 Neb. 37, 7 N. W. 739.

J. B. Wineman, for respondents.

The city council had jurisdiction to levy the special assessment in question. The plaintiff at no time appeared before the city council or special assessment committee to offer objections, and it should not now be heard to complain. *Poirier Mfg. Co. v. Kitts*, 18 N. D. 557, 120 N. W. 558; *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243; *Van-Gordon v. Goldamer*, 16 N. D. 323, 113 N. W. 609.

The boundaries of the assessment district as established by the city council show a definite description of the district, including plaintiff's

property. 2 Page & J. Taxn. by Assessment, § 551; Hamilton, Special Assessment, § 606; Thomason v. Cuneo, 119 Cal. 25, 50 Pac. 846; People ex rel. Price v. Wiemers, 225 Ill. 17, 80 N. E. 46; Rogers v. Salem, 61 Or. 321, 122 Pac. 312; West Berkeley Land Co. v. Berkeley, 164 Cal. 406, 129 Pac. 281; Carlson v. South Omaha, 91 Neb. 215, 135 N. W. 1047.

The city council has the power to amend an ordinance and place it on its second reading and final passage by one and the same vote, and duly record it in its proceedings. Further, the amended ordinance was adopted and acted upon. 2 Page & J. Taxn. by Assessment, § 845; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298.

This action is not predicated on the ground of fraud, and we contend that the statute not having provided for an appeal or a review by any other body, court, or tribunal, the action of the council is final, unless attacked for fraud. State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191; Freeman v. Trimble, 21 N. D. 1, 129 N. W. 83; Brown v. Saginaw, 107 Mich. 643, 65 N. W. 602; Soller v. Brown Twp. Bd. 67 Mich. 422, 34 N. W. 888; Northern P. R. Co. v. Seattle, 46 Wash. 674, 12 L.R.A.(N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 245; Job v. Alton, 189 Ill. 256, 82 Am. St. Rep. 452, 59 N. E. 622; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 663; Smith v. Worcester, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40; Chicago & A. R. Co. v. Joliet, 153 Ill. 649, 39 N. E. 1077; Chicago & N. W. R. Co. v. Elmhurst, 165 Ill. 148, 46 N. E. 437; People ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662; Illinois C. R. Co. v. People, 170 Ill. 224, 48 N. E. 215; French v. Barber Asphalt Paving Co. 181 U. S. 338, 45 L. ed. 887, 21 Sup. Ct. Rep. 625; 2 Page & J. Taxn. by Assessment, 927; McQuillin, Mun. Ord. 820; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; Hager v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Hutcheson v. Storrie, — Tex. Civ. App. —, 48 S. W. 788.

The plaintiff is guilty of gross laches by its conduct in not making known to defendant the alleged defects or irregularities of which it complained, until the assessment had been confirmed by the city coun-

cil. The only objections made by plaintiff were that the assessments were in excess of the benefits derived, and therefore unjust and unfair, and this not until nearly one year after the improvements were in. Plaintiff is estopped to make objections on other grounds. *Poirier Mfg. Co. v. Kitts*, 18 N. D. 557, 120 N. W. 558; 4 Dill. Mun. Corp. 5th ed. 2601-2603; *State, Vanatta, Prosecutor, v. Morristown*, 34 N. J. L. 445; *State, Ropes, Prosecutor, v. Essex Public Road Bd.* 37 N. J. L. 335; *State, Bogart, Prosecutor, v. Passaic*, 38 N. J. L. 57; *State, Ryerson, Prosecutor, v. Passaic*, 38 N. J. L. 171; *State, Youngster, Prosecutor, v. Paterson*, 40 N. J. L. 244; *State, Bowne, Prosecutor, v. Logan*, 43 N. J. L. 421; *State, Provident Inst. for Sav., Prosecutors, v. Jersey City*, 52 N. J. L. 490, 19 Atl. 1096; *State, Meday, Prosecutor, v. Rutherford*, 52 N. J. L. 499, 19 Atl. 972; *State, Simmons, Prosecutor, v. Passaic*, 55 N. J. L. 485, 27 Atl. 909; *State, Van Wagoner, Prosecutor, v. Paterson*, 67 N. J. L. 455, 51 Atl. 922; *Rosell v. Neptune City*, 68 N. J. L. 509, 53 Atl. 199; *Doughten v. Camden*, 71 N. J. L. 426, 59 Atl. 16; *Sears v. Atlantic City*, 72 N. J. L. 435, 60 Atl. 1093; *Tusting v. Asbury Bank*, 73 N. J. L. 102, 62 Atl. 183; *Durrell v. Woodbury*, 74 N. J. L. 206, 65 Atl. 198, 75 N. J. L. 939, 70 Atl. 1100; *State, Zabriskie, Prosecutor, v. Hudson*, 29 N. J. L. 115; *State, Charlier, Prosecutor, v. Woodruff*, 36 N. J. L. 204; *Hoboken Land & Improv. Co. v. Hoboken*, 36 N. J. L. 540; *State v. Trenton*, 36 N. J. L. 499; *Stetler v. East Rutherford*, 65 N. J. L. 528, 47 Atl. 489; *Borton v. Camden*, 65 N. J. L. 511, 47 Atl. 436; *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 127; *Weaver v. Chickasha*, 36 Okla. 226, 128 Pac. 305; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308; *Evansville v. Pfisterer*, 34 Ind. 36, 7 Am. Rep. 214; *Johnson v. Allen*, 62 Ind. 57; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; *Lundbrom v. Manistee*, 93 Mich. 170, 53 N. W. 161; *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526; *Atwell v. Barnes*, 109 Mich. 10, 66 N. W. 583; *Fitzhugh v. Bay City*, 109 Mich. 581, 67 N. W. 904; *Moore v. McIntyre*, 110 Mich. 237, 68 N. W. 130; *Walker Twp. v. Thomas*, 123 Mich. 290, 82 N.

W. 48; Tuller v. Detroit, 126 Mich. 606, 85 N. W. 1080; Gates v. Grand Rapids, 134 Mich. 96, 95 N. W. 998; Nowlen v. Benton Harbor, 134 Mich. 401, 96 N. W. 450; Farr v. Detroit, 136 Mich. 200, 99 N. W. 19; Stewart v. Detroit, 137 Mich. 381, 100 N. W. 613; Shaw v. Ypsilanti, 146 Mich. 712, 110 N. W. 40; W. F. Stewart Co. v. Flint, 147 Mich. 697, 111 N. W. 352; Constantine v. Albion, 148 Mich. 403, 111 N. W. 1068; Jones v. Gable, 150 Mich. 30, 113 N. W. 577.

Even where the proceedings are attacked for irregularity, and validity is denied, but color of law only exists in their favor, plaintiff would be estopped. Palmer v. Stumph, 29 Ind. 329; Hellenkamp v. Lafayette, 30 Ind. 192; Evansville v. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214; Lafayette v. Fowler, 34 Ind. 140; Muncey v. Joest, 74 Ind. 409; Logansport v. Uhl, 99 Ind. 531, 50 Am. Rep. 109; Peters v. Griffiee, 108 Ind. 121, 8 N. E. 727; Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723; Ross v. Stackhouse, 114 Ind. 200, 16 N. E. 501; Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; McCoy v. Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Vickery v. Hendricks County, 134 Ind. 554, 32 N. E. 880; Cluggish v. Koons, 15 Ind. App. 599, 43 N. E. 158.

No proper notice of any objection was timely given, and plaintiff is presumed to have assented, and it is estopped absolutely to assert the invalidity of the proceedings. Martindale v. Rochester, 171 Ind. 250, 86 N. E. 327; State, Read, Prosecutor, v. Atlantic City, 49 N. J. L. 562, 9 Atl. 759; State v. Green, 18 N. J. L. 179; State, Bowne, Prosecutor, v. Logan, 43 N. J. L. 421; State, Cunningham, Prosecutor, v. Merchantville, 61 N. J. L. 466, 39 Atl. 639; State, McKevitt, Prosecutor, v. Hoboken, 45 N. J. L. 484; Whitney Glass Works v. Glassboro Twp. 79 N. J. L. 352, 75 Atl. 756; Atwell v. Barnes, 109 Mich. 10, 66 N. W. 583; Close v. Chicago, 217 Ill. 216, 75 N. E. 479; Chandler v. Puyallup, 70 Wash. 632, 127 Pac. 293; Norman v. Spokane, 67 Wash. 630, 122 Pac. 330; Webb City ex rel. Franks v. Aylor, 163 Mo. App. 155, 147 S. W. 214.

The property in question was assessed according to the benefits and upon an equal basis, and no property was intentionally omitted. Page & J. Taxn. by Assessment, 325; Rogers v. Salem, 61 Or. 321, 122 Pac.

308; *Cote v. Highland Park*, 173 Mich. 201, 139 N. W. 69; *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214; *Chicago v. McKinlock*, 256 Ill. 38, 99 N. E. 858.

The necessity for laying a sewer in the city is exclusively a question for the determination of the city council. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308; *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354; *Re Twelfth Ave.* 66 Wash. 97, 119 Pac. 5; *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 25; *People ex rel. More v. County Ct.* 56 Barb. 136; *Mason v. Chicago*, 178 Ill. 499, 53 N. E. 354; *State, Green, Prosecutor, v. Hotaling*, 44 N. J. L. 347; *State, Frevert, Prosecutor, v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773; *Oil City v. Oil City Boiler Works*, 152 Pa. 348, 25 Atl. 549; *De Gravelle v. Iberia & St. M. Drainage Dist.* 104 La. 703, 29 So. 302; *J. & A. McKechnie Brewing Co. v. Canandaigua*, 15 App. Div. 139, 44 N. Y. Supp. 317; *Re Pequest River*, 42 N. J. L. 553; *Lenon v. Brodie*, 81 Ark. 208, 98 S. W. 979.

A time and a form are given the aggrieved party or owner when and where to correct any mistake made by the commission; and if the owner does not avail himself of such opportunity to present his objections, he is forever barred and precluded. *Kirby's Digest of Statutes*, §§ 5679 and 5685; *Kirst v. Street Improv. Dist.* 86 Ark. 1, 109 S. W. 526; *Lenon v. Brodie*, 81 Ark. 208, 98 S. W. 979; *St. L. S. W. R. Co. v. Red River Levee Dist.; Board of Improvement Dist. v. Offenhauser*, 84 Ark. 257, 105 S. W. 265; *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Dickson v. Racine*, 61 Wis. 545, 21 N. W. 620; *Paulson v. Portland*, 16 Or. 450, 1 L.R.A. 673, 19 Pac. 450.

The plaintiff not having tendered or offered to pay its just proportion of the special assessments, it is not entitled to relief in a court of equity. *Board of Improvement Dist. v. Offenhauser*, 84 Ark. 257, 105 S. W. 265; *Board of Improvement v. Pollard*, 98 Ark. 543, 136 S. W. 959; *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357; *Farrington v. New England Invest. Co.* 1 N. D. 102, 45 N. W. 191; *Grimmell v. Des Moines*, 57 Iowa, 144, 10 N. W. 330.

Any defects or irregularities in the proceedings of the commission or of the council have been cured and validated. *Session Laws, 1911, chap. 72.*

BRUCE, J. (after stating the facts as above).

We will first consider the first and fourth objections to the assessment, namely; (1) that appellant's property was not benefited by the improvement in question, and (4) that the assessment was excessive, and was made arbitrarily, and not according to the benefits.

According to the evidence, the property in the district was divided into three classes, the business district, the residence district, and the railroad district. In the business portion of the city there were 425 lots 25 x 140 feet in size. In the residence and railroad districts there were 1,317 similar lots. Lots abutting on the sewer were assessed both for a main and lateral sewer benefit. Lots in the business district were assessed 30 per cent higher than lots in the residence district. The railroad property (the Great Northern yards) was classed as residence property, allowance being made for the ground that would be taken up by streets and alleys if opened. Seventy-two per cent of the cost of the improvement was assessed against the railroad and residence property, and the remaining 28 per cent of the cost of the improvement was assessed against the business property. In making this latter assessment, this 28 per cent of the cost was divided by the 425 lots of 25 x 140 feet, each lot being charged its proportion of the total 28 per cent, with the exception that the lots abutting on the sewer were assessed both for a main and lateral sewer benefit, being assessed \$142.18, instead of \$111, which otherwise would have been their proportionate share. The question of the value of the lots and of the property was not taken into consideration, except in determining the difference in value of the three general different classes of property, namely, the business district, the residence district, and the railroad district. Generally speaking, the area method was applied, one of the commissioners testifying that "the basis was the benefits the property derived, that is, basing the number of openings that a property would need to get the benefits of the sewer,—the area value." To put the matter in another form, \$89,781 had to be raised to defray the cost of improvement. Lots 25 x 140 feet in size which were located in the residence district were assessed at a flat rate of \$41.88. Lots of the same size in the business district were assessed at the flat rate of \$55.5 each, approximately a 30 per cent increase over the assessment of the residence property. These assessments amounted

in all to \$79,150. In addition to this, and in order to make up the difference between the total cost of \$89,781 and the \$79,150, an additional charge for lateral benefits was levied upon property immediately adjacent to the sewer. The assessment, in short, was based, not upon the value of the property, or the increased market value thereof, but upon "the number of openings that a property would need to get the benefit from the sewer,—the area value." This resulted in lots of widely different market values being assessed the same amounts and on the same basis, and this method of assessment is attacked by the plaintiff and appellant. The assessment roll contains no list or finding of the amount each particular lot or parcel of land was benefited as required by § 2801, Rev. Codes 1905. It merely gives the amounts of the assessments, and states that they were "levied according to the benefits."

Although § 2801, Rev. Codes, 1905, requires special assessments for improvements, such as those in the case at bar, to be levied in proportion to the benefits conferred, and in no case to be in excess of such benefits, there is no provision in the statute as to how such benefits shall be measured and ascertained. Where this is the case, the weight of authority and of reason holds that an assessment according to the area is not necessarily invalid, provided that after a proper inspection it is found that the increased value or benefit to the lot is in proportion to that area. *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308-314; *Hamilton*, Special Assessments, § 605; *John v. Connell*, 71 Neb. 10, 98 N. W. 457. The finding, however, that a certain area will require a certain number of outlets, or can make a certain number of connections with a sewer, is not a finding of the extent to which it is or will be benefited by that sewer. If, indeed, the area basis is to be used, it should be considered merely as one of many elements to be considered in determining benefits, and not as the sole and only test. This we believe to be the general rule throughout the country. *Grand Rapids School Furniture Co. v. Grand Rapids*, 92 Mich. 564, 52 N. W. 1028; *People ex rel. Connelly v. Reis*, 109 App. Div. 748, 919, 96 N. Y. Supp. 597; *Clapp v. Hartford*, 35 Conn. 66; *State ex rel. Powell v. District Ct.* 47 Minn. 406, 50 N. W. 476; *State ex rel. Cunningham v. District Ct.* 29 Minn. 62, 11 N. W. 133; *State ex rel. Shannon v. District Judges*, 51 Minn.

539, 53 N. W. 800, 55 N. W. 122; *Loewenbach v. Milwaukee*, 139 Wis. 49, 119 N. W. 888. There can be no question that it is the rule which must be complied with in North Dakota. Prior to the passage of chapter 62 of the Laws of 1905, it would seem that, as in Colorado (see *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899), an assessment could be made upon the area basis alone, and that the commissioners were not required to make any formal finding or report of the amount each lot or tract of land was benefited. See Rev. Codes 1899, art. 28; *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242. In 1905, however, the legislature put itself on record as repudiating this method, and as requiring all assessments to be made on the basis of benefits, and of benefits alone. It was specific in the matter, so that there could be no evasion and no dispute. It specifically required an inspection of the lots or parcels of land by the commissioners, and it required the commissioners to make or cause to be made a complete list of *both the benefits and the assessments*, "setting forth each lot or tract of land assessed, and the amount such lot is benefited by the improvement, and the amount assessed against it." See § 2801, Rev. Codes 1905. It, in fact, required that the assessment should not be arbitrarily made, but that the actual benefits, as well as the apportionment of the assessment or cost, should be found and given, to the end that the assessment might not only be in proportion to the benefits, but that the owners of the property and the public might know the basis on which the assessments were levied, and the commission itself, and later the city council sitting as a board of review on appeal from the commission (see § 2803 Rev. Codes 1905), might have something definite before them. The finding of these facts and the doing of these things, we believe are, under the North Dakota statutes referred to, fundamental to the levying, the confirmation, and the validity of any assessment. There is, in fact, no authority to levy an assessment until the benefits have been first ascertained. Such being the case, the objection is not waived, nor is a subsequent collateral attack by means of a suit in equity to restrain the collection of the assessment precluded by the conclusions of the commissioners, or of the city council acting as a board of review on appeal, or by the fact that the specific point was not raised before such commission or such council. Without such prior finding and ascertainment of benefits, indeed, the commission and the city

council had no jurisdiction to proceed to a determination of the assessment as to each specific lot or tract to be assessed. Each class of special assessments has its required statutory procedure, and while similar they are not identical or always analogous in principle. Holdings on farm drainage benefits, for instance, as in *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 191, are not necessarily applicable to an improvement which is made under the authority of an act which relates to the government of cities, and which provides not only that the assessment rates shall be disclosed, but that the property shall be actually inspected and the specific benefits not only found, but a list of them made and reported. Under §§ 2801 and 2803, Rev. Codes 1905, the commissioners and city council act, it is true, as boards of review, but as such they can merely correct mistakes in judgment and errors in computation committed by the commissioners while exercising the powers conferred upon them by the statute. They review and correct errors of judgment committed in levying and apportioning the assessment after the acts and findings of benefits preliminary to the levying of that assessment have been done by the special assessment commission. They have no right to act and their findings are not conclusive in cases where the commissioners have not viewed the property, have not made any specific findings of the benefits, or have adopted a method of procedure which is entirely unwarranted by the statutes, and have sought a review and confirmation of an assessment which is illegally made. The judgment, in short, of a board or commission cannot be held to be conclusive when the record shows that, as a matter of fact, no judgment or discretion has been exercised at all. *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590, 592; *Watkins v. Zwie-tusch*, 47 Wis. 515, 3 N. W. 35; *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Milwaukee*, 52 Wis. 98, 8 N. W. 823; *Spence v. Milwaukee*, 132 Wis. 669, 113 N. W. 38.

It is really time that the courts should insist upon a greater care and a stricter compliance with the fundamental law in the case of special assessments. The real fact is that any kind of taxation by means of special assessments comes dangerously near to a violation of the constitutional provisions in regard to the uniformity of taxation and the proper protection of property and of property owners from harsh and unequal burdens. There is hardly any so-called special improvement

which does not redound to the benefit of the whole community, if indeed it benefits any one at all. Such improvements are often forced upon persons who are absolutely unable to pay for them, and who really derive no benefit whatever from their construction. Cases, indeed, are numerous where poor men have bought property and builded homes upon credit, which they would not have bought and could not have afforded to build if it were not for the cheapness of the land, and who, afterwards and because other persons have desired improvements, often merely for commercial purposes alone and to enhance the value of outlying property, have been confronted with special assessments far in excess of the original cost of the property to them. Many a mortgage has been foreclosed, not because the mortgagor and homebuilder would have been unable to pay it standing by itself, but because the added burden of unanticipated special assessments has been more than he could bear. This species of taxation has, it is true, now been so generally recognized and sustained by the courts that its validity may not any longer be questioned, but we think we are safe in saying that it never would have been sanctioned if it had not been for the fact that in all parts of the United States municipalities in the period of their youth and prodigality, and even dishonesty, had exceeded their debt limits so that unless special assessments were authorized, really necessary improvements could not be forthcoming. Its approval, indeed, has been merely due to the fact that one generation has mortgaged the interests of another. Such being the case, we believe that the least the courts can now do is to require that the statutory safeguards be at least reasonably complied with. "This species of taxation," says the supreme court of South Dakota in the case of *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590-592, "under whatever rule, is fraught with such opportunities of confiscation and inequality that justice to property owners demands that statutes on this subject should receive a strict construction, and that every statutory requirement should be strictly complied with and construed to the end that inequalities and confiscations should be reduced to the minimum."

We have carefully examined the authorities cited by counsel for respondent, but find that they are not applicable to the statutory provisions of this state. Either the local statutes which are therein considered differ materially from our own, or there is a showing that,

though the reports of the commissioners and the assessment rolls were defective in form, the benefits had in fact been properly considered, and all of the material requirements of the law had been actually complied with. Among these cases are: *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734; *Hennessey v. Douglas County*, 99 Wis. 129, 74 N. W. 983; *Northwestern & P. Hypotheek Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Ferrall v. Spokane*, 73 Wash. 200, 131 Pac. 808; *Chandler v. Puyallup*, 70 Wash. 632, 127 Pac. 293; *Fisher v. Chicago*, 213 Ill. 268, 72 N. E. 680; *Gross v. People*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012; *Kankakee v. Illinois C. R. Co.* 257 Ill. 298, 100 N. E. 996; *LeMoyne v. West Chicago Park Comrs.* 116 Ill. 41, 4 N. E. 498, 6 N. E. 48.

Appellant corporation further contends that it derived no benefit from the sewer in question, for the reason that there was already a sewer in existence, 12 inches in diameter and some 16 feet beneath the surface, which was fully adequate to the needs, both present and prospective, of its particular property and the original drainage district to drain which the first sewer was installed. If this was the case the assessment was clearly illegal, in so far as the appellant was concerned (*Rogers v. Salem*, 61 Or. 321, 122 Pac. 308), unless perhaps it was also shown that the outside area drained by such sewer was so connected with the property in question and sought to be taxed that the improvement of such outside area would necessarily affect the taxed area and add to its market value. See *Bell v. Burlington*, 154 Iowa, 607, 134 N. W. 1082. It is true that city councils are, generally speaking, the sole judges of the necessity of sewers and of the efficiency, durability, and adaptability of those already in existence. 28 Cyc. 1130; *Philadelphia use of Yost v. Odd Fellows Hall Asso.* 156 Pa. 105, 31 Atl. 917; *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281; *St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713; *Michener v. Philadelphia*, 118 Pa. 535-540, 12 Atl. 174; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308. It is also often true that though a sewer may be perfectly adequate for the drainage of the house sewage of a particular lot, it is not adequate to carry off the surface water which naturally falls upon the lot from adjoining property, and forms a pond thereon, so that a sewer beginning outside of such lot and draining the surface water at the points of its origin is necessary not merely

for the adjacent property, but for the lot itself. There must be, however, some limit to the burdens which may be placed upon property for such purposes. If the sewer already constructed upon the lot of plaintiff and appellant was in reasonably good repair, and was adequate to carry off both the sewage and drainage, present and prospective, of the lot and the *district in which it was originally constructed*, and the building of the new sewer, some 30 feet beneath the ground and some 14 feet beneath the original sewer, was only necessary because of the needs of *outlying* districts and in order that their sewers might have a proper fall, we can see no reason why plaintiff's property should be made to pay the cost of the additional improvement.

Appellants' next objection is that certain lots within the sewer district were omitted from the assessment. Whether this omission would be fatal or not depends largely upon the circumstances. The general rule seems to be that the fraudulent omission to assess property clearly liable for a portion of the cost of an improvement will invalidate an assessment but that the city council may exercise a large discretion in determining what property is benefited and hence liable to the assessment, and that the accidental omission to assess property liable cannot be urged against the validity of an assessment by one whose assessment is not increased by reason of such omission. 28 Cyc. 1162; *Masters v. Portland*, 24 Or. 161, 33 Pac. 540; *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 126.

There is in the case at bar, serious doubt as to whether the lots were omitted at all, and whether the assessment that should have been levied thereon was not added to that of other contiguous property not belonging to the petitioner, but to other persons who had made no objections to the assessment. If such is the case, the petitioner can in no way be injured by the omission. It is also shown that a portion of the property claimed to have been omitted belongs to the petitioner itself, and it certainly cannot complain of its omission. The amount also of the charges which might in any event be made against the omitted property are so small that it is doubtful whether a distribution over the whole of the district would add materially to the taxes of anyone. These matters, however, can be considered on the new assessment provided for by §§ 2787 and 2788, Rev. Codes 1905, if such be made. It is sufficient for us to say that the plaintiff and appellant

was not precluded from raising the question in the equitable proceedings before us by reason of the fact that the point was not urged before the commissioners sitting as a board of review, or the city council on appeal. It might have been estopped by such failure if these bodies had had any power to consider the question. *Spalding v. Denver*, *supra*. As we have before stated, however, no legal assessment roll was made, and the commissioners acting as a board of review and the city council had nothing before them to review, or any jurisdiction over the immediate subject-matter.

We are not, however, prepared to say from the evidence before us that the property of appellant was not benefited to some extent by the improvement. It is true that the evidence seems to show that the natural drainage of the land was toward the river, so that the question of surface water would largely be eliminated. It is clear to us from the evidence that the original sewer was sufficient for the property east of Third street, or at any rate that lying north and south of De Mers avenue. The evidence, however, is undisputed that the sewer was not sufficient for the drainage of the Ontario Store, the Widlund Building, and other modern buildings which in recent years have been erected on Third street, and which discharged their sewage into the old sewer. If they were assessed, they were assessed on the basis of benefits, both present and prospective, to their property, arising from both present and prospective uses, and this would include the modern buildings above mentioned. The evidence, therefore, tends to show that the old sewer was not adequate for the old district, even though it might have been adequate for the property of appellant alone if the added sewage of the old district did not flow into it.

Such being the case, the property of appellant should bear some portion of the cost of the new improvement. We are unable, however, to determine from the record how much this should be, and the amount can only be found upon a reassessment. We have before us, indeed, no finding of benefits whatever. All we have are the assessments levied against other pieces of property; and whether those assessed were in proportion to the benefits, and, if so, in what proportion, we are totally unable to determine.

We now come to the contention of appellant that the sewer district was not legally designated, and that the ordinance is void in so far as

least as plaintiff's property is concerned. Appellant alleges that the sewer district was attempted to be created by ordinance No. 253, which passed its first reading October 5th, 1908; that this ordinance came up for final passage on November 6th, 1908, at which meeting a petition was presented asking that the boundaries of the district be changed by striking out the line of city blocks lying between Alpha and International avenues. The boundaries of the district as proposed in the original ordinance included all of the territory within the city, bounded on the south by Bruce avenue, on the southwest by the city limits, on the north by International avenue, and on the east by the Red River of the North, and the amendment proposed to make Alpha avenue the north boundary of the district, cutting off the city blocks north of such avenue. This amendment was carried by a yea and nay vote. The amendment, however, appears to have been incorrectly drafted, and to have enlarged, instead of diminished, the district, the northwesterly boundary being placed at a point on the east line of lot 2, block S, Budge and Eschelman's Second Addition, and thence along said line in a northeasterly direction to its intersection with the Red River of the North to the place of beginning. This amendment, it appears, was incorporated in the original ordinance, and the ordinance as so amended placed upon its second reading and final passage and carried by the yea and nay vote. It was approved by the mayor on November 10th, 1908. Subsequently, and on the 1st day of February, 1909, the ordinance was amended by ordinance No. 258, which latter ordinance changed the number of said sewer district from sewer district No. 2 to sewer district No. 10. Thereafter plans, estimates, and specifications were prepared by the city engineer, duly approved by the council on February 23d, 1909, and the city auditor was authorized to advertise for bids thereon. These bids were opened by the city council on March 5, 1909, and referred to the city engineer, who reported thereon at a meeting of the council held March 16th, 1909. At this meeting the contract for the construction of the sewer was let, and the sewer was completed on the 14th day of November, 1910. It appears also that plans and specifications were on file in the office of the city auditor from on or about the 23d day of February, 1909, giving a full description of the proposed sewer and all real property included in the improvement district, and that there was also in his office a copy of

the resolution of the city council authorizing and directing the city engineer to prepare the same, and which resolution gave the route of the proposed sewer, specifying particularly the streets under which it was to be constructed, and which plans and specifications and resolution were open to public inspection. Later the mistake in the boundary of said sewer district was discovered, and on March 23d, 1911, an ordinance was introduced and adopted and passed May 1, 1911, and duly published on May 4th, 1911, which rectified the mistake, conforming said ordinance to the amendment actually proposed, but which was improperly drafted, and which made Alpha avenue the northerly boundary of said sewer district. Subsequently the special assessment commission of the city of Grand Forks prepared its proposed assessment to defray the cost of the construction of said sewer, and gave due notice that they would meet at the office of the city auditor of said city on August 10th, 1911, to hear any and all complaints or objections to said proposed assessment. At this time and place the plaintiff appeared and filed his objections to the proposed assessment, alleging that "such proposed assessment against the real property above mentioned (the real property of petitioner specified in said objections) is in excess of any and all benefits derived from said improvement by said property; and (2) that such proposed assessment against said real property is excessive, unjust, and unfair as compared with the proposed assessment for such improvement against other property of greater value and which receives greater benefits therefrom." These objections were overruled and the assessment confirmed, and on an appeal being taken to the city council the same objections were urged and likewise overruled. Neither before the commission nor before the city council did the petitioner make any point as to the invalidity of the ordinances, or any of them, or as to the fact of their indefiniteness in regard to the boundaries of the district, or as to the manner of the passage of the ordinance in question, nor that its property was not included in each and all of the ordinances.

Even if the petitioner can now urge points and objections which were not urged before the special assessment commissioners and the city council, there would hardly seem to be any merit in them. It is quite clear to us that the property of the petitioner was included in the descriptions of all of the ordinances, no matter how their provisions

may be construed. Counsel for petitioner alleges, it is true, that the provision, "thence along the said line in a northeasterly direction to its intersection with the Red River of the North," was fatally defective; "as the line referred to did not run in the direction of the river it is impossible to locate this course with any degree of certainty or definiteness, as such call would be satisfied with a line running anywhere from due east to due north which intersected the river." There appear, however, to have been at all times plats on file describing the district and the property affected, and petitioner could hardly have been misled. It, in fact, never raised the point until the action was brought in the district court, and it not only allowed the proceedings to go on and the sewer to be constructed without objection or raising the point, but allowed the assessment to be confirmed as to all of the other property owners. The appellant's property was included in all of the ordinances and amendments. The location and extent of the sewer was the same in all of the ordinances and was undisputed. It would have been perfectly competent for the commissioners and the council, even after they had established a sewer district, to have found that certain property therein was not benefited and to have refused to levy an assessment against the same. This is practically all that the council did in the case at bar by the amendment of May 1, 1911.

The only provisions of our statute upon the subject of sewer districts are found in §§ 2772 and 2773, Rev. Codes 1905. They are: "§ 2772. Any city shall have power to create sewer, paving, and water-main districts within the limits of such city, which shall be consecutively numbered. Section 2773. Such sewer districts shall be of such size and form as the city council, after consultation with the city engineer, shall decide most practicable for the purpose of the drainage of such portion of such city as may be included in the respective districts as established by the city council." It would seem by these statutes that the size and form of the district is a matter to be decided entirely by the council after consultation with the city engineer, and the only question in which the property owner is interested or has a right to be heard in a court of law is upon the question of benefits, and whether the assessment upon his property is a just proportion of the total benefits conferred upon all property owners.

We are ready to concede the general proposition that when municipal

corporations seek to impose upon property owners the burden of the cost of street improvements, the statute or charter which prescribes conditions precedent to the imposition of such a burden must be strictly pursued, but we find no departure from the statute in the case at bar. There is a wide distinction between requirements which relate to the nature of the improvement, its necessity and its cost, and those which relate to the spreading of the assessment. For these reasons we do not believe that the cases of *Bennett v. Emmetsburg*, 138 Iowa, 67, 115 N. W. 582; *Comstock v. Eagle Grove*, 133 Iowa, 589, 111 N. W. 51; *Mason v. Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770; *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734; *McLauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710,—cited by counsel for appellant,—are applicable here. They all relate to cases where the council neglected to find the necessity or cost of the improvement, or to do acts necessary and prerequisite to the letting of the contract, rather than to the assessing and distributing of the cost.

There is no merit in the objections to the manner of the adoption of the ordinances and of the amendments thereto, that the city council could not legally amend and place an ordinance upon its second reading and final passage by one and the same vote, and that the city council had no right to grant the petition for an amendment in any other manner than by a ye and nay vote. The record shows that the ordinance as amended was adopted by a ye and nay vote. The only provision of the Code upon this subject is § 2671, Rev. Codes 1905. It provides that the yeas and nays shall be taken upon the passage of all ordinances and on all propositions to create any liability against the city, or for the expenditure or appropriation of money." The amendment in question involved an amendment to an ordinance, and not the passage of an ordinance, nor, strictly speaking, did it create any liability against the city, or provide for the expenditure or appropriation of money.

As far as the objection to placing an ordinance upon its second reading and final passage by one and the same vote is concerned, we have merely to say that the procedure, at the most, was irregular, and that the courts will hesitate to interfere in such cases when no **wrong** seems to have been committed. The objection, then, at the most, is merely a technical one. "While it is, of course, desirable that council should

regard parliamentary law in its proceedings, an ordinance is not rendered invalid because in enacting it the council violated the rules of parliamentary law. The fact that council has adopted a parliamentary code does not prevent council from disregarding such code in specific instances, if it sees fit to do so." 2 Page & J., Taxn. by Assessment, § 845. In the case of *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667, a so-called amendment, which was in effect a substitute, was adopted. The original motion as amended was not then put to a formal vote, but the council treated it as carried by the vote adopting the amendment. It was held that such action was contrary to the rules of parliamentary law, but did not render the proceeding invalid. There appears to have been no greater irregularity in the case before us. See also *Landes v. State*, 160 Ind. 479, 67 N. E. 189; *Sedalia ex rel. Gilsonite Constr. Co. v. Scott*, 104 Mo. App. 595, 78 S. W. 276; *Sedalia ex rel. Gilsonite Constr. Co. v. Montgomery*, 169 Mo. App. 197, 88 S. W. 1014.

The judgment of the District Court is reversed, and judgment ordered as prayed for in the complaint.

ISABELLA McDOWELL v. SAMUEL McDOWELL.

(147 N. W. 104.)

Order granting new trial — appeal — district court — objections — stipulation.

An appeal from an order granting a new trial will be deemed to have been waived where the senior counsel for appellant has not merely intimated to the trial judge before the making of such order that he deemed it necessary and would stipulate thereto, but after the making of such order, and on the cause being called for disposition on a new trial, the junior counsel for appellant, having announced his readiness for trial, asked that the cause might be dropped on the calendar, and set for a day certain in order that his senior might be accommodated, who was absent from the state, and where the court had no knowledge or information that there was any objection to a new trial until the appeal was taken, which was not done until the day before the trial was to be had.

Opinion filed May 8, 1914.

27 N. D.—37.

Motion for leave to prepare and serve specification of error inadvertently omitted. Counter motion to dismiss appeal.

Appeal dismissed.

Statement by BRUCE, J.

The defendant has brought before us for consideration an order to show cause "why he should not be allowed to prepare and serve specifications of error as required by chapter 4 of § 131 of the Laws of 1913," and also to show cause "why the clerk of the supreme court should not return the record in the above-entitled action to the clerk of the district court of Eddy County, North Dakota, in order that the same may be completed and properly certified to the supreme court." Opposed to this is a counter motion by the plaintiff to dismiss the appeal on the ground that the same is from an order granting a motion for a new trial, and that the defendant waived the right to such appeal by consenting to such new trial.

The defendant in support of his petition alleges that an order granting a motion for a new trial in the action was made on the 25th day of November, 1913, and served on the attorneys for the defendant on the 19th day of December, 1913; that the notice of appeal and undertaking was prepared and served by the defendant on the attorneys for the plaintiff on the 17th day of February, 1914, but, through an oversight and inadvertence in preparing the said notice of appeal, the defendant's attorney failed to prepare specifications of error, and failed to serve specifications of error; and that the notice of appeal is as required by chapter 131 of the Session Laws of 1913.

Buck & Jorgenson and Thorp & Chase, of Jamestown, N. D. for appellant.

Maddux & Rinker, of New Rockford, N. D. for respondent.

BRUCE, J. (after stating the facts as above). The defendant and appellant is not in a position either to ask for an extension of time in which to file his specification of error, or to have the record remanded so that this may be done. By consenting to the motion for a new trial, both by his statement to the trial judge before the making of the order,

that he believed it necessary, and that he would stipulate that the order might be made, and by appearing when the case was called for trial, and asking that it be set for a day certain, without raising any objection whatever to its trial, or suggesting that he still insisted upon his right to appeal, and only seeking to assert the same upon the evening before the day on which the trial was to be had, defendant appeared, as it were, in that new trial, and submitted once more to the jurisdiction of the trial court, so that his right to an appeal was waived.

The motion of the plaintiff is granted, while that of the defendant is denied.

BURKE, J., being disqualified, did not participate.

FRED W. VOLLMER v. ROBERT STREGGE.

(147 N. W. 797.)

Criminal conversation — action for damages — marriage — proof of — evidence of plaintiff and wife — sufficient.

1. In an action to recover damages for criminal conversation, plaintiff and his wife each testified to the fact of their marriage, and such testimony is uncontradicted.

Held, that such testimony was competent and sufficient to establish the marriage contract as alleged in the complaint.

Instructions to jury — whole charge must be considered — issue — damages.

2. Appellant challenges the correctness of certain instructions to the jury, but when such instructions are considered in the light of the charge as a whole, and especially in the light of the fact that the sole issue submitted to the jury was that of the extent of plaintiff's damages, they were nonprejudicial to the defendant.

Admissions of defendant — argument of counsel — issue of amount of damages — no other ground for reversal will be heard.

3. Defendant admitted upon the witness stand that he repeatedly had illicit relations with plaintiff's wife as alleged in the complaint, and his counsel, in his argument to the jury, in effect told them that the sole question for their determination was that of the amount of damages which should be awarded

Note.—On the question of excessive damages in action for alienation of affections or criminal conversation, see note in 42 L.R.A.(N.S.) 582.

the plaintiff. In the light of these admissions, defendant will not be heard to urge in the supreme court any grounds for reversal not relating to the question of damages.

Error — assignment of — requested instructions.

4. Certain assignments of error are predicated upon the refusal of the trial court to give certain requested instructions, but such rulings are held non-prejudicial for reasons stated in the opinion.

Error — requested instructions — refusal — charge as whole.

5. Error cannot be successfully predicated upon rulings refusing to give requested instructions, where the charge, as given, substantially and accurately covers the matter embraced in the instructions thus requested.

Damages — not excessive — magnitude of wrong — important trial.

6. The damages awarded to the plaintiff by the jury were small considering the magnitude of the wrong concededly perpetrated by defendant upon plaintiff's marital rights. There is no contention that such damages were excessive, or that the jury, in assessing the same, was actuated by passion or prejudice; and a consideration of the entire record satisfies us that defendant had an eminently fair and impartial trial, free from errors of a prejudicial character. In the light of the facts, it is held that defendant has no cause for complaint upon any of the grounds urged in his assignments.

Opinion filed May 9, 1914.

Appeal from District Court, McHenry County, *A. G. Burr, J.*

From a judgment in plaintiff's favor and from an order denying a new trial, defendant appeals.

F. J. Funke and *E. R. Sinkler*, for appellant.

In an action for damages for criminal conversation, the marriage between plaintiff and his wife must be proved by direct evidence, and not by mere circumstances, such as cohabitation or reputation. *Dann v. Kingdom*, 1 Thomp. & C. 492; *Catherwood v. Caslon*, 13 Mees. & W. 261, Car. & M. 431, 13 L. J. Exch. N. S. 334, 8 Jur. 1076; *Case v. Case*, 17 Cal. 598; *People v. Anderson*, 26 Cal. 129; *Keppler v. Elser*, 23 Ill. App. 643; *Campbell v. Carr*, 6 U. C. Q. B. O. S. 482; 3 Wigmore Ev. 2804, 2807; 21 Cyc. 1630 and cases cited; *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485; *Abbott*, Trial Ev. 631 and authorities cited; *Snowman v. Mason*, 99 Me. 490, 59 Atl. 1019; *Stark v. Johnson*, 43 Colo. 243, 16 L.R.A.(N.S.) 674, 127 Am. St. Rep. 114, 95 Pac. 930; 15 Ann. Cas. 868.

The court's instruction to the jury that they might take into consideration the testimony of defendant that a criminal charge was still pending against him, in determining the weight to be given to his evidence, was erroneous, and to the prejudice of the defendant. *People v. Elster*, 2 Cal. Unrep. 315, 3 Pac. 884; *Marx v. Hilsendegen*, 46 Mich. 336, 9 N. W. 439; *People v. Wolcott*, 51 Mich. 612, 17 N. W. 78; *Kober v. Miller*, 38 Hun, 184; *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254; *Sullivan v. Newman*, 63 Hun, 625, 43 N. Y. S. R. 893, 17 N. Y. Supp. 424; *V. Loewers Gambrinus Brewery Co. v. Bachman*, 45 N. Y. S. R. 48, 18 N. Y. Supp. 138; *People v. Carolan*, 71 Cal. 195, 12 Pac. 52; *Smith v. State*, 79 Ala. 21; *Bates v. State*, 60 Ark. 450, 30 S. W. 890; *People v. Hamblin*, 68 Cal. 101, 8 Pac. 687; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *People v. Noelke*, 94 N. Y. 144, 46 Am. Rep. 128; *People v. Irving*, 95 N. Y. 541; *State v. Kent (State v. Pancoast)*, 5 N. D. 557, 35 L.R.A. 518, 67 N. W. 1052; 2 Wigmore, Ev. p. 1110; *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *People v. Warren*, 134 Cal. 202, 66 Pac. 212; *State v. Nussenholtz*, 76 Conn. 92, 55 Atl. 589; *Germinder v. Machinery Mut. Ins. Asso.* 120 Iowa, 614, 94 N. W. 1108; *Ashcraft v. Com.* 22 Ky. L. Rep. 1542, 60 S. W. 931; *Howard v. Com.* 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533; *Johnson v. Com.* 22 Ky. L. Rep. 1885, 61 S. W. 1005; *Com. v. Welch*, 111 Ky. 530, 63 S. W. 984; *Ashcraft v. Com.* 24 Ky. L. Rep. 488, 68 S. W. 847; *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 109; *State v. Renswick*, 85 Minn. 19, 88 N. W. 22; *Lipe v. Eisenlerd*, 32 N. Y. 238; *McKesson v. Sherman*, 51 Wis. 303, 8 N. W. 200; Greenl. Ev. 16th ed. 461b, 461c, pp. 579, 580; *Slater v. United States*, 1 Okla. Crim. Rep. 275, 98 Pac. 112; *State v. Sanderson*, 83 Vt. 351, 75 Atl. 961; *Starling v. State*, 89 Miss. 328, 42 So. 798; *State v. Stewart*, 6 Penn. (Del.) 435, 67 Atl. 786; *Missouri K. & T. R. Co. v. Creason*, 101 Tex. 335, 107 S. W. 527; *Musgraves v. State*, 3 Okla. Crim. Rep. 421, 106 Pac. 544; *Nelson v. State*, 3 Okla. Crim. Rep. 468, 106 Pac. 647; *Dotterer v. State*, 172 Ind. 357, 30 L.R.A.(N.S.) 846, 88 N. E. 689; *Keys v. United States*, 2 Okla. Crim. Rep. 647, 103 Pac. 874; *Smith v. United States*, 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; *People v. Elster*, 2 Cal. Unrep. 315, 3 Pac. 884; *Langhorne v. Com.* 76 Va. 1012; *State v. Ripley*, 32

Wash. 182, 72 Pac. 1036; *Watson v. State*, 155 Ala. 9, 46 So. 232; *Landy v. Moritz*, 33 Ky. L. Rep. 223, 109 S. W. 897; *State v. Nyhus*, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; *Roop v. State*, 58 N. J. L. 479, 34 Atl. 749; *Carr v. State*, 43 Ark. 99, 5 Am. Crim. Rep. 438; *Anderson v. State*, 34 Ark. 257; *Stanley v. Aetna Ins. Co.* 70 Ark. 107, 66 S. W. 432; *Re James*, 124 Cal. 653, 57 Pac. 578, 1008; *State v. Burton*, 2 Marv. (Del.) 446, 43 Atl. 254; *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496; *State v. Huff*, 11 Nev. 17; *State v. Fournier*, 108 Minn. 402, 122 N. W. 329; *Kolb v. Union R. Co.* 23 R. I. 72, 54 L.R.A. 646, 91 Am. St. Rep. 614, 49 Atl. 392; *State v. Thompson*, 127 Iowa, 440, 103 N. W. 377; *Dungan v. State*, 135 Wis. 151, 115 N. W. 350; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564.

Where plaintiff's wife had sexual intercourse with defendant voluntarily, and thereafter plaintiff, with full knowledge of such facts, continued to live and cohabit with his wife, such fact should be submitted to the jury, under instructions by the court, as in mitigation of damages; and it was error to refuse same. *Smith v. Hockenberry*, 146 Mich. 7, 117 Am. St. Rep. 615, 109 N. W. 23, 10 Ann. Cas. 60.

The court should have given the requested instruction to the effect that no man can take advantage of his own wrong, and that if the jury found from the evidence that the plaintiff connived at the sexual intercourse between his wife and defendant, no recovery could be had. *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073; *Morning v. Long*, 109 Iowa, 288, 80 N. W. 390; *Hoggins v. Coad*, 58 Ill. App. 58.

Christianson & Weber, for respondent.

Assignments of error are waived by failure to present and discuss them in the brief. They will be held as abandoned. Rule 14, supreme court rules; *Pendroy v. Great Northern R. Co.* 17 N. D. 434, 117 N. W. 531; *Nokken v. Avery Mfg. Co.* 11 N. D. 404, 92 N. W. 487; *Foster County Implement Co. v. Smith*, 17 N. D. 178, 115 N. W. 663; *Ulmer v. McDonnell*, 11 N. D. 391, 92 N. W. 482; *Kelly v. Pierce*, 16 N. D. 235, 12 L.R.A.(N.S.) 180, 112 N. W. 995.

Errors should not only be clearly specified, but it should be shown

in the brief why the rulings of which complaint is made are erroneous. 2 Cyc. 1016.

The marriage and its validity can only be put in issue by special plea. It is not raised by general denial. 5 Enc. Pl. & Pr. 619; 21 Cyc. 1630.

A presumption, unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect; unless so controverted, the jury are bound to find according to the presumption. Rev. Codes 1905, §§ 7315, 7317.

The fact of the marriage may be proved by the testimony of the contracting parties. *State v. Rood*, 12 Vt. 396; *Jacobsen v. Siddal*, 12 Or. 280, 53 Am. Rep. 360, 7 Pac. 108; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Com. v. Dill*, 156 Mass. 226, 30 N. E. 1016; *Com. v. Hayden*, 163 Mass. 453, 28 L.R.A. 318, 47 Am. St. Rep. 468, 40 N. E. 846, 9 Am. Crim. Rep. 408; *State v. Nadal*, 69 Iowa, 478, 29 N. W. 453; *Smith v. Fuller*, 138 Iowa, 91, 16 L.R.A.(N.S.) 91, 115 N. W. 912.

The court submitted a written charge. No exceptions or objections to any portion thereof were taken as by law provided. Counsel cannot afterwards urge objections. Rev. Codes 1905, § 7021.

All presumptions are in favor of the regularity of the trial and of all proceedings. *State v. Wright*, 20 N. D. 216, 126 N. W. 1023, Ann. Cas. 1912C, 795; 3 Cyc. 305; *Vail v. Reynolds*, 42 Hun, 647.

The court's instructions could not have prejudiced the defendant, as there was in reality no conflict as to the material facts. *Cochran v. State*, 113 Ga. 726, 39 S. E. 333; *Chicago City R. Co. v. Olis*, 192 Ill. 514, 61 N. E. 460.

Plaintiff's consent and connivance must be specially pleaded in defense to an action by him to recover damages for criminal conversation with his wife, before it can be claimed to bar the action. *Morning v. Long*, 109 Iowa, 288, 80 N. W. 390.

All matters in mitigation of damages must be specially pleaded. *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. 622.

Where the verdict is not excessive, or even claimed to be so, errors in instructions on the measure of damages are harmless. *Jones v. Monson*, 137 Wis. 478, 129 Am. St. Rep. 1082, 119 N. W. 179; *Se-*

curity Sav. Bank v. Smith, 144 Iowa, 203, 122 N. W. 825; Pico v. Stevens, 18 Cal. 376; Davis v. Reamer, 105 Ind. 318, 4 N. E. 857; Wells v. Houston, 29 Tex. Civ. App. 619, 69 S. W. 183; Cartier v. Douville, 98 Mich. 22, 56 N. W. 1045; Flanagan v. Baltimore & O. R. Co. 83 Iowa, 639, 50 N. W. 60; Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 871; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38; Durfee v. Newkirk, 83 Mich. 522, 47 N. W. 351.

Where defendant failed to appear on his own motion for a new trial, he will be deemed to have abandoned the same. *Monroe v. Lippman Bros.* 115 Ga. 164, 41 S. E. 717; *Calumet Furniture Co. v. Reinhold*, 51 Ill. App. 323; *Boggs v. Clark*, 37 Cal. 236; *Moore v. Kendall*, 121 Cal. 145, 53 Pac. 647; *Dorey v. Brodis*, 153 Cal. 673, 96 Pac. 278.

The court was not compelled to search the record, and proceed to a hearing on the motion for a new trial, upon failure of the moving party to appear. 29 Cyc. 1008, 1013.

Defects in pleadings or proceedings, not affecting the substantial rights of the parties, shall be disregarded. Rev. Codes 1905, § 6886; *State v. Albertson*, 20 N. D. 513, 128 N. W. 1122; *State v. Staber*, 20 N. D. 545, 129 N. W. 104; *State v. Winbauer*, 21 N. D. 70, 128 N. W. 679, Ann. Cas. 1913B, 564.

FISK, J. This is an action to recover damages for criminal conversation. The complaint is in the usual form, alleging that one Marie Vollmer is, and at all times mentioned in the complaint was, the wife of the plaintiff, and that in the month of April, 1911, and at divers and sundry times since the 26th day of April, 1911, while plaintiff was living and cohabiting with and supporting his said wife, the defendant, wrongfully contriving and intending to injure the plaintiff, and to deprive him of the comfort, society, aid, assistance, and affection of his wife, did stealthily visit plaintiff's home in plaintiff's absence, and wilfully and maliciously debauch and carnally know the said Marie Vollmer without the privity or consent of plaintiff. That by means of plaintiff's said unlawful acts the affection which the said Marie Vollmer thus had for plaintiff was alienated, and plaintiff was deprived of the comfort, society, aid, and assistance which he other-

wise would have had from his said wife, and plaintiff has suffered great distress of body and mind, and that the shame, disgrace, and humiliation heaped upon plaintiff and his family because of the foregoing unlawful and wrongful acts of defendant, plaintiff has been damaged in the sum of \$5,000, and he prays for judgment accordingly.

The answer consists of a general denial.

The issues were tried to a jury in McHenry county in April, 1912, and the trial resulted in a verdict in plaintiff's favor for the sum of \$1,000. Judgment was entered accordingly on April 4, 1912. Thereafter a statement of the case was duly settled and a motion for a new trial was made and denied on October 5, 1912.

Defendant appeals, both from the judgment and from the order denying his motion for a new trial, assigning numerous alleged errors upon which he asks this court to review the judgment and order appealed from.

We shall notice only such assignments as are discussed in appellant's printed brief.

Appellant's first contention is that the evidence entirely fails to show that Marie Vollmer, at the time of the acts complained of, was the wife of the plaintiff, and that there is no evidence that they were ever legally married. Counsel for appellant states his contention as follows: "It is the contention of appellant, in an action of criminal conversation, that the marriage between the plaintiff and his wife must be proved by direct evidence, not by circumstantial evidence, and an actual marriage must be proven, and not a marriage by cohabitation and reputation." And in support thereof he cites numerous authorities. We have examined these authorities, and they no doubt support appellant's contention under the common-law rule that marriage must be proved by direct evidence, in other words, an *actual marriage* must be proved, and that merely proof of cohabitation, reputation, or other circumstances from which it may be inferred only, do not amount to evidence of an actual marriage. But we think counsel's assumption that the proof in the case at bar does not constitute direct evidence of an actual marriage is unwarranted. Both plaintiff and his wife testified to the fact of their marriage.

Plaintiff testified as follows:

Q. What relation is Marie Vollmer to you, married?

A. She is my wife.

Q. How long have you been married to her?

A. Nine years.

Q. And during the time that you and Marie Vollmer have been married you have been living on your farm previously described, have you?

A. Yes, sir.

And the witness, Marie Vollmer, testified as follows:

I am acquainted with Fred W. Vollmer, the man who testified a little while ago.

Q. What relationship exists between you and him, if any?

A. He is my husband.

Q. When and where were you married?

A. In Minnesota.

Q. About how long ago?

A. About nine years ago.

Q. And since that time you have been living together as husband and wife have you?

A. Yes, sir.

In addition to this the defendant and his wife both went on the stand, and testified to the fact that plaintiff and his wife and their children had been living as their neighbors for the past nine years.

By the great weight of authority such testimony was competent and amply sufficient to prove the fact of the marriage of plaintiff to Marie Vollmer. *State v. Rood*, 12 Vt. 396; *Jacobsen v. Siddal*, 12 Or. 280, 53 Am. Rep. 360, 7 Pac. 108; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Com. v. Dill*, 156 Mass. 226, 30 N. E. 1016; *State v. Nadal*, 69 Iowa, 478, 29 N. W. 451; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Kilburn v. Mullen*, 22 Iowa, 498; *State v. Williams*, 20 Iowa, 98; *State v. Wilson*, 22 Iowa, 364; *Bissell v. Bissell*, 55 Barb. 325.

In *Jacobsen v. Siddal*, 12 Or. 280, 53 Am. Rep. 360, 7 Pac. 108,

which was an action for criminal conversation, it was said: "The basis of the plaintiff's right to recover arises out of the alleged relation of husband and wife, and the fact of marriage must be proved by direct evidence. By the bill of exceptions it appears that after the plaintiff and his wife had testified directly to the fact of marriage, a certificate of the same was offered in evidence, to which several objections were made and sustained. Whether the objections were well taken or not is immaterial, as the plaintiff was competent to testify to the marriage. The contract of marriage, or its solemnization before a minister or magistrate, may be proved by the testimony of an eyewitness, and for this purpose a party is competent. . . . It is not perceived why all persons having knowledge of the facts, and especially those ordinarily most conversant with them, the parties themselves, should not be permitted to testify."

In *Bailey v. State*, the Nebraska court, among other things, said: "It is claimed that in cases like that at bar there must be direct evidence of the marriage. This may be true, but Mrs. Bailey's testimony is direct evidence of the fact. The rule, when examined in the light of the authorities, only forbids in such cases the establishing of a marriage by proof of cohabitation, reputation, and holding out."

In *Com. v. Dill*, 156 Mass. 226, 30 N. E. 1016, Mr. Justice Holmes, of the supreme judicial court of Massachusetts, in answering the contention that the record of the marriage should be produced, said: "It is true that the record by statute is presumptive evidence of the marriage (Pub. Stat. Chap. 145, § 29), but the record of a marriage is not like the record of a divorce, or other judgment or decree. It is a mere memorandum or declaration of the fact which effected the result, not itself the fact, nor that which has been constituted the only evidence of the fact. Sec. 31. There is no reason why the oath of the person who did the act should be deemed inferior evidence to a written statement by him or another,"—citing *Com. v. Norcross*, 9 Mass. 492; *Com. v. Waterman*, 122 Mass. 43, 59; *Com. v. Stevenson*, 142 Mass. 466, 468, 8 N. E. 341; *State v. Marvin*, 35 N. H. 22.

We might also add that under subdivision 30 of § 7317, Rev. Codes 1905, the fact that plaintiff and Marie Vollmer entered into a lawful contract of marriage is presumed under the facts disclosed.

In so far as we are aware, there is no exception to the application of such statutory presumption to cases of the character of the one now before us.

Respondent's counsel, in this connection, calls our attention to the common-law rule to the effect that under the general issue the fact of marriage is not put in issue, and that a special plea is required to put the same in issue. 5 Enc. Pl. & Pr. 619; 21 Cyc. 1630. But whether this rule should apply to general denials under the code system we need not here determine. A marked distinction in some respects is recognized in the authorities between the general issue at common law and the general denial under the codes.

For the above reasons, appellant's first contention must be overruled.

It is next contended that the trial court erred in giving certain instructions to the jury, and in refusing to give certain instructions requested by appellant.

The instruction most vigorously criticized is as follows: "And you may take into consideration the testimony of the defendant that a criminal charge is still pending against him, to determine what weight and credence you will give to his testimony." Standing alone, such instruction might be deemed sufficiently prejudicial to warrant a reversal; but when considered, as it must be, in the light of the whole charge, and also in the light of the facts as disclosed by the record, that the sole issue submitted to the jury was that of plaintiff's damages, we are unable to perceive how it could have been in the least prejudicial. The record discloses no conflict upon the vital issues in the case. That defendant had carnal knowledge with plaintiff's wife on many occasions was expressly admitted by him under oath, and the fact that plaintiff and Marie Vollmer were married was, as we have observed, established by the testimony of both the plaintiff and his said wife. Not only was it true that the sole question for determination by the jury was that of the assessment of damages, but the record before us affirmatively discloses that defendant's attorney, during his argument to the jury, expressly stated to them: "I believe that the court will instruct you that in this case, you must return a verdict for the plaintiff for something, and that the only question for you to determine is how much you will allow, and I believe *that is a correct instruction*;

I believe that that is the law." By such statement, manifestly, defendant is now foreclosed from predicated error upon any ruling, or upon the giving or refusal to give any instructions not pertaining to the assessment of damages. It would be a reproach upon the law if counsel were permitted to reverse his position thus taken at the trial, and now be heard to allege error as to rulings and instructions in no way pertaining to the assessment of damages.

Moreover, it is entirely manifest that the damages awarded by the jury were reasonable and far from excessive, and a new trial would avail defendant nothing. He had a fair trial, wherein his counsel conceded plaintiff's right to recover damages, and there is no pretense on this appeal that the damages awarded were excessive.

Appellant says that "closely allied to the erroneous instruction above set out is the statement of the court in the presence of the jury as follows: 'Let the record show that on the 12th day of March Mr. Funke represented the defendant in a criminal action growing out of the same transaction.'" Counsel for appellant complains of this statement, and contends that it constituted prejudicial error. We see no merit in such contention. The record discloses that this remark was made by the court before the jury was impaneled, and was not addressed to the jury but merely made in connection with his ruling forcing defendant to trial. Defendant's attorney had moved for a continuance of the case, and the entire statement of the court was as follows: "Let the record show that on the 12th day of March Mr. Funke represented the defendant in a criminal action growing out of the same transaction, and it was agreed between the defendant and the state then and there that the case would be heard on the 21st day of March, and that prior to the 21st of March counsel for the defendant in this case stated to the court that Mr. Funke was discharged, and that he was the counsel in that case, and that on the 11th day of March this case was set for trial for the 30th of March, and due notice given to the defendant and his counsel, and therefore the motion is overruled." Such statement was neither prejudicial, nor even improper.

We have examined the other instructions complained of, and discover nothing therein erroneous or prejudicial to the defendant.

Appellant assigns error upon the refusal to give the following in-

struction requested by him: "If you find from the evidence in this case that the plaintiff's wife did have sexual intercourse with the defendant voluntarily, and thereafter the said plaintiff, with full knowledge of such voluntary sexual intercourse, has continued and does continue to live and cohabit with his said wife, then I charge you that you may take such fact into consideration in mitigation of such damages." When the charge is considered in its entirety we do not think the refusal to give the above instruction, although perhaps abstractly correct, was prejudicial error. The charge in some respects was more favorable to the defendant than he was entitled, for, among other things, the jury was instructed as follows:

"There has been no evidence introduced to show that the affections of Marie Vollmer have been alienated from the plaintiff, nor that the plaintiff has been deprived of the assistance of his wife, nor her aid or society, and therefore these are grounds of damage which have not been proven." We think, in any event, the giving of this instruction cured any error in the refusal to give the one asked as above, for the court, in effect, eliminated from the consideration of the jury, as not proven, the facts chiefly alleged as tending to enhance plaintiff's damages, and by so doing left no occasion or necessity for a charge as to mitigating facts and circumstances.

Complaint is also made of the ruling refusing to give the following instruction: "It is a rule of law laid down in the statutes of this state that no man can take advantage of his own wrong, and if you can find from the evidence in this case that the plaintiff connived at the sexual intercourse between defendant and his wife, then I charge you that the plaintiff cannot recover, and your verdict must be for the defendant."

Several sufficient answers may be made to this contention. 1st. Counsel's statement to the jury to the effect that the sole question for the jury's consideration was that of the extent of plaintiff's damage, we think precludes defendant from now urging such alleged error. 2d. The giving of the requested instruction was unwarranted, for there is no basis in the evidence therefor. 3d. Such requested instruction was substantially covered in the charge as given, and this

is all that was, in any event, necessary. *Smith v. Myers*, 52 Neb. 70, 71 N. W. 1006.

Two other requests for instructions were refused, and error assigned on such rulings, but we deem extended notice thereof unnecessary. In each instance the instructions requested were substantially covered in the charge as given, and we find no prejudicial error in the rulings complained of.

In conclusion, we desire merely to say that the record, as a whole, discloses that defendant was accorded a fair trial, and has no just cause for complaint. The damages awarded are small considering the magnitude of the wrong concededly perpetrated upon plaintiff's marital rights by this defendant according to his own brazen admissions in court. It is not contended that the verdict is excessive, or that the jury was influenced by passion or prejudice in deciding the case. A motion for a new trial was made and denied in the trial court, and an appeal taken from such order, but appellant has not seen fit to assign such ruling as error, and we are firmly convinced that such ruling was proper, and that the judgment is a righteous one and ought not to be disturbed.

Affirmed.

MISSOURI SLOPE LAND & INVESTMENT COMPANY, a Corporation, v. J. D. HASTÉAD.

(147 N. W. 643.)

New trial — order granting — irregularly or erroneously made — cannot be reviewed by judge of another district — collateral attack.

1. An order granting a new trial, even though irregularly and erroneously made, cannot be reviewed or held for naught by another district judge of another judicial district where the action was pending, especially upon a mere collateral attack.

Action — trial — division of judicial district — creation of new district — judgment — order vacating — collateral attack.

2. After the trial of an action the judicial district wherein the same was tried was divided, and a new judicial district created, and the county in which such action was tried is embraced within such new district. The court stenog-

rapher's minutes of the testimony having been lost, and the judge of the new district, having no knowledge of the case, made an order transferring such cause to the judge of the old district who presided at the trial. Thereafter an order was made attempting to vacate the order transferring such cause, and subsequently the judge to whom the same had been transferred, on an *ex parte* application, made an order vacating the judgment and granting a new trial upon the ground of inability, owing to the loss of the reporter's notes of the testimony, to settle a statement of the case so as to enable defendant to obtain a trial *de novo* in the supreme court. Thereafter plaintiff's counsel secured an order to show cause why such order vacating the judgment and granting a new trial should not be vacated. Upon the hearing of such order to show cause before the judge of the old district, plaintiff's motion was denied, and no appeal taken therefrom. Subsequently, the cause having been placed upon the calendar for trial in the proper county of the newly created district, plaintiff objected to the trial upon the ground that such action was no longer pending, the cause of action having been merged in a judgment, and that more than one year had elapsed since the date of service of the notice of entry thereof, and that the order aforesaid, vacating such judgment and granting a new trial, was void for lack of jurisdiction in the court granting it.

Held, that the attack on such order was a mere collateral attack, and it was error to sustain such objection.

Order — void — voidable — res judicata.

Held, further, that the order vacating the judgment and granting a new trial was not void, but, at the most, merely voidable when properly attacked; and the order refusing to vacate the order which granted the new trial is *res judicata*.

Opinion filed May 12, 1914.

Appeal from District Court, Billings County, *S. L. Nuchols*, Special Judge.

From an order refusing to proceed with the trial, defendant appeals. Reversed.

Purcell & Divet, and *J. A. Miller*, for appellant.

The transfer of a county to a new judicial district does not oust the judge of the old district from jurisdiction to settle a statement of the case or grant a new trial in a case originally tried before him. *Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491; Et vide *Darelius v. Davis*, 74 Minn. 345, 77 N. W. 214; *McCord v. Knowlton*, 76 Minn. 391, 79 N. W. 397; Rev. Codes 1905, § 6766.

The statement of the case should be settled by the judge before whom the case was tried. *Bass v. Swingley*, 42 Kan. 729, 22 Pac. 714; *State v. McClintock*, 37 Kan. 40, 14 Pac. 511; *Manning v. Mathews*, 66 Iowa, 675, 24 N. W. 271.

Three parties are necessary to and interested in the settlement of a bill of exceptions or statement of the case. *Northwestern Port Huron Co. v. Zickrick*, 22 S. D. 89, 115 N. W. 525; *Matthews v. Superior Ct.* 68 Cal. 638, 10 Pac. 128; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 916, 22 N. E. 990; *Ohms v. State*, 49 Wis. 415, 5 N. W. 827, 3 Am. Crim. Rep. 362.

The terms "qualification" and "jurisdiction" are dissimilar. *Dupoyster v. Clarke*, 121 Ky. 694, 90 S. W. 1; *State ex rel. Penfro v. Wear*, 129 Mo. 619, 31 S. W. 608; *State v. Moberly*, 121 Mo. 604, 26 S. W. 364; *Nebraska Mfg. Co. v. Maxon*, 23 Neb. 224, 36 N. W. 492; *State ex rel. Cougill v. Sachs*, 3 Wash. 691, 29 Pac. 446; *Fisher v. Puget Sound Brick, Tile & Terra Cotta Co.* 34 Wash. 578, 76 Pac. 107; *Frevert v. Swift*, 19 Nev. 363, 11 Pac. 273; *Et vide State v. Heiser*, 20 N. D. 357, 127 N. W. 72; *Gould v. Duluth & D. Elevator Co.* 3 N. D. 101, 54 N. W. 316; *Getchell v. Great Northern R. Co.* 22 N. D. 325, 133 N. W. 912.

If a motion for new trial is made before a new judge, it is his imperative duty to grant it. *Bass v. Swingley*, 42 Kan. 729, 22 Pac. 714; *Ohms v. State*, 49 Wis. 415, 5 N. W. 827, 3 Am. Crim. Rep. 362; *United States v. Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301; *People ex rel. Wright v. Superior Ct. Judge*, 41 Mich. 726, 49 N. W. 925; *Woolfolk v. Tate*, 25 Mo. 598.

If a party is unable, through no fault of his own, to furnish a transcript of the evidence, he should be granted a new trial as a matter of right. *Holland v. Chicago, B. & Q. R. Co.* 52 Neb. 100, 71 N. W. 989; *Zweibel v. Caldwell*, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84; *Curran v. Wilcox*, 10 Neb. 449, 6 N. W. 762; *Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491.

If irregularity exists in the order granting a new trial, it renders the order merely voidable, and not void. *Throop*, Pub. Off. §§ 622 et seq; *Williams v. Williams*, 6 S. D. 295, 61 N. W. 38; *Rev. Codes 1905*, §§ 6765 & 6766; *Gould v. Duluth & D. Elevator Co.* 3 N. D. 96, 54

N. W. 316; Bruegger Case, 20 N. D. 72, 126 N. W. 491; State v. Heiser, 20 N. D. 368, 127 N. W. 72; Riggs v. Owen, 120 Mo. 176, 25 S. W. 356.

The granting of a motion for a new trial without service of notice does not make the order void. Rev. Codes 1905, § 7326.

The motion to vacate the order granting a new trial having been denied, review of the same could only be had by appeal, and not by a renewal of said motion at the new trial. Enderlin State Bank v. Jennings, 4 N. D. 228, 59 N. W. 1058.

Service of a copy of the judgment does not start the running of the statutory year for appeal. First Nat. Bank v. McCarthy, 13 S. D. 356, 83 N. W. 423; Re New York C. & H. R. R. Co. 60 N. Y. 115; Fry v. Bennett, 16 How. Pr. 404; Kelly v. Sheehan, 76 N. Y. 325; Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; McKenzie v. Bismarck Water Co. 6 N. D. 371, 71 N. W. 608; Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; Yorks v. Peck, 17 How. Pr. 192.

Where a party undertakes to limit the time for appealing, he must serve such notice as the rules and practice require. He is held to strict practice. Kelly v. Sheehan, 76 N. Y. 325; Good v. Daland, 119 N. Y. 153, 23 N. E. 474; Tronsrud v. Farm Land Finance Co. 20 N. D. 567, 129 N. W. 359.

Courts of general common-law jurisdiction have inherent power to grant new trials. 29 Cyc. 722, 723, note, 21, 727, note, 64; State ex rel. Berndt v. Templeton, 21 N. D. 470, 130 N. W. 1009.

Failure to give notice of intention to move for a new trial does not in anywise go to the question of jurisdiction. 37 Century Dig. col. 1270; 29 Cyc. 921; Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195; Gould v. Duluth & D. Elevator Co. 2 N. D. 216, 50 N. W. 969; McKenzie v. Bismarck Water Co. 6 N. D. 361, 71 N. W. 608.

New trial should always be granted where the right of appeal is destroyed or lost through no fault of moving party. Henrichsen v. Smith, 29 Or. 475, 42 Pac. 486, 44 Pac. 496; Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 54; Fire Asso. of Philadelphia v. McNerney. — Tex. Civ. App. —, 54 S. W. 1053; People ex rel. Wright v. Superior Ct. Judge, 41 Mich. 726, 49 N. W. 925; Borrowscale v. Bosworth, 98 Mass. 37; Crittenden v. Schermerhorn, 35 Mich. 370 (Per

Cooley, Judge); *Greenville v. Old Dominion S. S. Co.* 98 N. C. 163, 3 S. E. 505; *Owens v. Paxton*, 106 N. C. 480, 11 S. E. 375; *Nelson v. Marshall*, 77 Vt. 44, 58 Atl. 793; *McCotter v. New Shoreham*, 21 R. I. 425, 44 Atl. 473; 29 Cyc. 874 and 875; *Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491; *Kitzman v. Minnesota Thresher Mfg. Co.* 10 N. D. 26, 84 N. W. 585; *Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721.

L. A. Simpson and W. L. McBride, for respondent.

In granting new trials in cases that have been tried, submitted, and determined, the statutory method must be pursued. *Parrott v. Hot Springs*, 9 S. D. 202, 68 N. W. 329; *Williams v. Chicago & N. W. R. Co.* 11 S. D. 463, 78 N. W. 949.

Notice of intention to move for new trial must be given as by law provided it was not done in this case. Rev. Codes 1905 §§ 7065, 7068, 7086; *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281; *Hayne, New Trials*, p. 14.

The actual service of the written notice of the entry of judgment started the running of the statute limiting the time for appeal. *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129.

FISK, J. This is an appeal from an order made by Judge S. L. Nuchols on April 12, 1912, while acting as special judge of the tenth judicial district, declining and refusing defendant's demand for a trial of the action. The order reads as follows:

"It is hereby ordered that the motion of the defendant and his demand for a trial be, and they hereby are, overruled and denied upon the sole and only ground that the action is not pending for trial, but that the issues involved therein have been merged in a final judgment, which judgment remains unvacated and unreversed, and the order of his Honor, Judge Winchester, of date the 14th day of January, 1911, assuming to grant a new trial hereof, is void and of no force and effect."

The facts essential to a complete understanding of the questions for decision are stated in appellant's brief in substance as follows:

The action was brought in 1906, to quiet title to certain land in Billings county. The answer alleges by way of defense a contract of purchase of the land, and a partial payment thereon by note. The

reply denies the terms of the contract, and alleges that the defendant had defaulted in the payment of the note. The case came to trial on October 11, 1906, at Dickinson, Stark county. At this time Stark county was in the sixth judicial district, of which Judge Winchester was the regular judge. The trial resulted in findings, conclusions, and order for judgment favorable to the plaintiff. These were signed by Judge Winchester on December 31, 1908, and judgment was entered on February 3, 1909.

By chapter 162, Laws 1907, the tenth judicial district was formed, and Stark county, among others, was transferred to it; and at the fall election of that year Honorable W. C. Crawford was elected the judge of that district.

On March 3, 1909, J. A. Miller, one of the attorneys for the defendant, made an affidavit for extension of time to settle a bill of exceptions and make a motion for new trial. The reason for asking for this stay was that the original papers and transcript of the evidence could not be found. Upon this affidavit an order was made by Judge Crawford on March 3, 1909, as prayed for. Various other stays were granted, and finally, it being shown that the defendant was utterly unable to prepare a statement of the case, although he had made inquiry of the plaintiff's attorneys, Judge Winchester, the clerk of court, and the court stenographer, and had made trips to Medora and various places in Montana, Judge Crawford, on December 5, 1910, made an order that "all further proceedings in the matter be had before the Honorable W. H. Winchester, judge of the sixth judicial district, and the judge before whom this case was originally tried," because as (the order recited), "he (Judge Crawford) was not present at the trial of the action, and knows nothing of the evidence there adduced, he is not in a position to satisfactorily settle the statement of case."

Thereafter and on January 11, 1911, on an *ex parte* motion and on the affidavit of L. A. Simpson, one of the attorneys for the plaintiff, Judge Crawford revoked the order of December 5, 1910, transferring the case to Judge Winchester, reciting as a ground "that said order inadvertently by the court recited statements not in accordance with the record in said case."

Pursuant to the order of December 5, 1910, an *ex parte* motion

was made in behalf of the defendant to set aside the judgment, and for a new trial, and granted by Judge Winchester under date of January 14, 1911.

Thereupon a motion was made before Judge Winchester by the plaintiff's attorneys, upon notice and order to show cause, to vacate the order granting new trial. This motion was heard on February 15, 1911, and denied.

Thereafter the case came up for new trial before Judge Crawford, who requested in writing that Judge Nuchols, of the twelfth judicial district, preside at the trial and hear all motions, etc. On April 12, 1912, the defendant moved the case for trial, which motion was opposed by the plaintiff. After argument of counsel, and on the same day, Judge Nuchols made the order complained of.

From the foregoing statement of facts it is, at the outset, apparent that the order of Judge Winchester vacating the judgment theretofore entered by him, and granting a new trial, was equitable and just, as it afforded defendant an opportunity to procure the necessary record upon which his right to a trial *de novo* in this court can be exercised. It merely granted or attempted to grant, by motion in the action, the relief to which defendant would no doubt otherwise have been clearly entitled in an action in equity. *Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491; *Henrichsen v. Smith*, 29 Or. 475, 42 Pac. 486, 44 Pac. 496; 29 Cyc. 874. Such order ought, therefore, to be given force and effect, unless it clearly appears that the same was a nullity for lack of jurisdiction to make it.

In making the order from which this appeal is prosecuted, Judge Nuchols held that the Winchester order was absolutely void. The particular grounds upon which the learned court deemed such order to be void are recited in his order, but we are unable to discover any sound reason for such holding. Conceding that the order of Judge Crawford, made on January 11, 1911, purporting to vacate his order of December 5, 1911, transferring jurisdiction of the cause to Judge Winchester, was authorized in law and therefore effective, still we would be confronted with a situation wherein a judge in an adjoining district assumed to exercise jurisdiction in a cause pending in another district, and, concededly, his acts would not be void, but merely

voidable, for such is the express provision of the Code,—§ 6766, Rev. Codes 1905. Nor would the fact that the order granting such new trial was made without notice and merely on an *ex parte* application, or without any prior notice of intention to move for a new trial, alter the situation. Such failures to comply with the rules of practice prescribed by the Code constituted mere irregularities which could have been taken advantage of in a direct attack, but not otherwise. Respondent's counsel argue, and no doubt Judge Nuchols held, that no jurisdiction to make such order existed for the reason that more than one year had elapsed after notice of the entry of the judgment was served. This ground is, we think, wholly untenable, even conceding the premise that such notice was served, which fact is emphatically denied by appellant. For the purposes of this appeal we will assume that notice was given as contended by respondent. It by no means follows, however, that the order of Judge Winchester was void and subject to attack collaterally as was done in this case. That the objection of plaintiff to the trial of the case was merely a collateral attack on the order of Judge Winchester is too clear for debate. See *Van Fleet*, Collateral Attack, §§ 3 and 4.

The respondent cites *Parrott v. Hot Springs*, 9 S. D. 202, 68 N. W. 329, and *Williams v. Chicago & N. W. R. Co.* 11 S. D. 463, 78 N. W. 949, but these were cases of direct attack on the order by appeals.

Conceding, for the sake of argument, that jurisdiction to entertain or decide a motion for new trial terminates upon the expiration of one year from the date of notice of entry of judgment (although see *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085, and *Williams v. Fairmount School Dist.* 21 N. D. 198, 129 N. W. 1027) yet whether facts exist in a particular case showing such lapse of time must, of necessity, be determined judicially when raised, and such determination, whether right or wrong, is a finality unless directly attacked. In the case at bar Judge Winchester necessarily passed on this question, both in granting the *ex parte* order vacating the judgment and granting a new trial, and also in later denying plaintiff's motion to vacate his prior order, one of the grounds urged on such motion being loss of jurisdiction by lapse of time. No attack on these rulings was made by plaintiff other than the collateral attack by the objection, interposed before

another court of co-ordinate jurisdiction, to defendant's motion to proceed with the trial. Manifestly, it was error on Judge Nuchols part to sustain such objection. As before stated, the sole ground for such ruling was that "the action is not pending for trial, but that the issues involved therein have been merged in a final judgment, which judgment remains unvacated and unreversed, and the order of his Honor, Judge Winchester, of date the 14th day of January, 1911, assuming to grant a new trial hereof, is void and of no force and effect." The learned judge committed a double error, first, in assuming the right to review the order of Judge Winchester on such a collateral attack; and, second, in holding such order to be void and of no force and effect when it was, at the most, merely voidable when properly attacked by a direct proceeding. By procuring the order to show cause, plaintiff invoked the exercise of jurisdiction by the court, acting through Judge Winchester to pass upon facts, the existence of which was essential to the jurisdiction of that court to grant the new trial. Judge Winchester passed thereon, holding adversely to the plaintiff. Whether right or wrong, such decision could not be set aside and held for naught by Judge Nuchols, especially upon a mere collateral attack. This, we think, is entirely plain and controlling on this appeal. This court has held in effect that such order was *res judicata* and that even on a direct attack no other district judge had power to review it. *Enderlin State Bank v. Jennings*, 4 N. D. 228, 59 N. W. 1058.

The order is reversed and the cause remanded for further proceedings.

B. L. SHUMAN v. CITIZENS STATE BANK OF RUGBY,
NORTH DAKOTA.

(— L.R.A.(N.S.) —, 147 N. W. 388.)

**Bank — general deposit money — may apply on antecedent debt of depositor
— trust money — knowledge of bank — application — consent — trustee.**
1. A bank may apply a general deposit of money to the payment of an ante-

Note.—The question of the right of a bank to apply deposit by fiduciary or representative on his debt to itself is treated in a note in 1 L.R.A.(N.S.) 1110. And as

cedent debt of a depositor, where, though the money is in fact trust money, it is deposited without any knowledge of the trust on the part of the bank, and the application to the debt is consented to by the trustee or depositor.

Demand note — due at once on delivery — demand unnecessary — original makers.

2. A demand note, even though drawing interest, is, as between the original makers, due and payable at once and upon its delivery, and without the formality of demand.

General deposit money — demand note held by bank — permission to apply in payment implied.

3. If a general deposit of money is made while a bank holds a demand note against the depositor, permission to apply the deposit to the payment of such note is implied.

Notes — indorsers — holders in due course — liability.

4. Sections 6355, 6372-6376 and 6548, Rev. Codes 1905, relate primarily to the rights and liabilities of indorsers and holders in due course, and not to the rights and liabilities of the makers of a demand note.

Bank — general deposit — right to offset past-due note — lien — offset — application of payments.

5. The right of a bank to offset, as against a general deposit, a past-due debt owing to the bank by a depositor, is not founded upon the theory of a lien, but upon the right of offset and application of payments.

General deposit in bank — not a bailment — credit — debtor.

6. A general deposit of money in a bank is not a bailment to said bank, but a giving of credit merely. After the making of such deposit the bank is a debtor, and not a bailee.

Banker's lien — property held as bailee — general deposit.

7. Sec. 6288, Rev. Codes 1905, which gives to the banker a lien upon all property in its possession belonging to the depositor, relates merely to such property as is held by the banker as a bailee. It does not relate to a general deposit made in such bank.

Opinion filed April 21, 1914. Rehearing denied May 18, 1914.

Appeal from the district court of Pierce County, *Burr, J.*

Action to recover money deposited in a bank by a trustee. Judgment for defendant. Plaintiff appeals.

Affirmed.

to the applicability of deposits to individual indebtedness of depositor where word suggestive of fiduciary character is appended to his name, see notes in 10 L.R.A. (N.S.) 706, and 37 L.R.A. (N.S.) 409. See also note in 82 Am. St. Rep. 520.

Statement by BRUCE, J.

Plaintiff deposited in the defendant bank, as part of his general deposit, money belonging to a client, his mother, which was given him in order that he might pay certain taxes and other debts owing by the *cestui que trust*. There is no evidence that a deposit in the trustee's name was consented to or authorized by the *cestui que trust*, or, on the other hand, of the fact that the trust was known to the bank. Against this deposit the bank offset a personal indebtedness of the plaintiff and trustee, arising upon a demand note which drew interest and was not made payable at any particular place. Immediately upon being notified of the fact of the application, the trustee repudiated the transaction, and now sues the bank for a refusal to honor checks drawn by such plaintiff and trustee in payment of the debts of the *cestui que trust*, which he was directed to pay, and which checks were issued before any knowledge or notification of the attempted offset was had by him, although they were not presented for payment until after such application and notification. The trial court directed a verdict in favor of the defendant, and from a judgment of dismissal entered thereon this appeal is taken.

E. C. Bowen and B. L. Shuman, for appellant.

The usual depositor's passbook issued by the bank is *prima facie* evidence of the matters therein contained; but it is not conclusive, and may be explained. The bank is simply the custodian of moneys placed therein by the depositor. 5 Cyc. 517; *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 182; *Watson v. Phœnix Bank*, 8 Met. 217, 41 Am. Dec. 500.

Demand for payment of a "demand note" must be made before same becomes due. §§ 6355, 6373, 6387, 6548; 2 Century Dict. & Enc. 1523; *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625.

A bank cannot make application of deposit money to the payment of a debt not due. 5 Cyc. 553; *Oatman v. Batavian Bank*, 77 Wis. 501, 20 Am. St. Rep. 136, 46 N. W. 881.

The deposit money must belong to the customer or depositor. *Third Nat. Bank v. Stillwater Gas Co.* 36 Minn. 75, 30 N. W. 440; 3 Am. & Eng. Enc. Law, 835, 836; *Farmers' & M. Bank v. Farwell*, 7 C. C.

A. 391, 19 U. S. App. 256, 58 Fed. 633; *Armstrong v. National Bank*, 53 Iowa, 752, 5 N. W. 742; 5 Cyc. 551, 552; *First Nat. Bank v. Peisert*, 2 Pennp. 277.

A banker gets no better title to the money than the depositor had. *Farmers' & M. Bank v. Farwell*, 7 C. C. A. 391, 19 U. S. App. 256, 58 Fed. 633; *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163, 18 N. W. 629; *Burntett v. First Nat. Bank*, 38 Mich. 630; *Nichols v. State*, 46 Neb. 715, 65 N. W. 774; *Cady v. South Omaha Nat. Bank*, 49 Neb. 125, 68 N. W. 358.

The money deposited, and so applied by the bank, belonged to Eliza Shuman, and appellant was merely her agent, and had no title to such money. *First Nat. Bank v. Bache*, 71 Pa. 213; *Frazier v. Erie Bank*, 8 Watts & S. 18; 1 Am. & Eng. Enc. Law, 1176, 1177; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 213.

Neither Eliza Shuman, the owner of such money, nor appellant, ever consented to such application. *Smith v. Des Moines Nat. Bank*, 107 Iowa, 620, 78 N. W. 238.

A. E. Cogger and T. A. Toner, for respondent.

A demand note, as against the maker, is due and payable at once upon delivery, and without any previous demand. *Palmer v. Palmer*, 36 Mich. 489, 24 Am. Rep. 605; 2 Randolph, Com. Paper, § 1039; 7 Cyc. 848; *O'Neil v. Magner*, 81 Cal. 631, 15 Am. St. Rep. 88, 22 Pac. 876; *Darling v. Wooster*, 9 Ohio St. 517; *Hitchings v. Edmands*, 132 Mass. 338.

The relation of a general depositor to a bank is simply that of creditor and debtor. 3 Am. & Eng. Enc. Law, 826.

After a deposit of money, it belongs to the bank, and may be loaned by it. 3 Am. & Eng. Enc. Law, 827, 828.

Where one deposits as agent, as between him and the bank the money belongs to the bank. 3 Am. & Eng. Enc. Law, 833.

Where a general deposit is made by one already indebted to the bank, the bank may appropriate such money to the payment of such indebtedness. 3 Am. & Eng. Enc. Law, 826; 2 Am. & Eng. Enc. Law, 433; 5 Cyc. 550.

Deposits made by an agent or trustee may also be so applied and appropriated by the bank, in the absence of notice or knowledge of the

trusteeship. 5 Cyc. 550; *Kimmel v. Bean*, 68 Kan. 598, 64 L.R.A. 785, 104 Am. St. Rep. 415, 75 Pac. 1118; *Smith v. Des Moines Nat. Bank*, 107 Iowa, 620, 78 N. W. 238; *First Nat. Bank v. Valley State Bank*, 60 Kan. 621, 57 Pac. 510; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Holly v. Missionary Soc.* 180 U. S. 284, 45 L. ed. 531, 21 Sup. Ct. Rep. 395; *School Dist. v. First Nat. Bank*, 102 Mass. 174; *Hatch v. Fourth Nat. Bank* 147 N. Y. 184, 41 N. E. 403; *Long v. Emsley*, 57 Iowa, 11, 10 N. W. 280; *Smith v. Crawford County State Bank*, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690; *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202, 40 L.R.A. 250, 66 Am. St. Rep. 167, 29 S. E. 182; *Re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784; *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511; *Overseers of Poor v. Bank of Virginia*, 2 Gratt. 544, 44 Am. Dec. 399.

BRUCE, J. (after stating the facts as above). There are only two matters to be decided upon this appeal. First, as against the maker of a demand note which draws interest and is made payable at no particular place, is a demand necessary to mature such a note, or is it due at once and upon delivery? Second, has a bank the right to apply to the payment of an overdue note held by it a general deposit of the maker, when part of the moneys in such deposit are owned by some other party, but the bank has no notice or knowledge, actual or constructive, of such claim of ownership until after the application?

There can now be no longer any question under the authorities that a bank will be protected in applying a deposit of money to the payment of an antecedent debt of the depositor, where, though the money is in fact trust money, it is deposited without any knowledge of the trust on the part of the bank, and the application to the debt is consented to by the trustee or depositor. *Tough v. Citizens' State Bank*, 89 Kan. 583, 132 Pac. 174; *McStay Supply Co. v. Stoddard*, 35 Nev. 284, 132 Pac. 545; *Pom. Eq. Jur.* § 1048; *Miller v. Race*, 1 Burr. 452; *School Dist. v. First Nat. Bank*, 102 Mass. 174; *Marsh v. Oneida Cent. Bank*, 34 Barb. 298.

It seems also to be generally conceded that if a deposit of money is made in the face of an overdraft or of a past-due obligation, such consent will be implied from the mere fact of the deposit. *Kimmel v.*

Bean, 68 Kan. 598, 64 L.R.A. 785, 104 Am. St. Rep. 415, 75 Pac. 1118; First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337; 5 Cyc. 550, and notes; Pom. Eq. Jur. § 1048.

The question now before this court is whether a demand note occupies the same place as an overdraft or a past-due obligation; that is to say, is the depositor required to look upon it as an ever present and immediate liability, so that a deposit of money will be deemed to be accepted and made with the implied permission to apply the deposit to the payment of the debt.

That a demand note may be thus offset is, we believe, the only logical conclusion which can be reached if we once accept the premise that a demand note, even though drawing interest, is due at the time of its delivery, and as between the original makers needs no presentment or demand. This premise, although it is seemingly illogical, and although we believe opposed to the original intention of the law merchant, is supported by an overwhelming weight of authority, and was so supported at the time of the drafting of the so-called uniform negotiable instruments act, its approval by the commission on uniform state laws, and its adoption by over thirty states of the Union, including North Dakota. Brooks v. Mitchell, 9 Mees. & W. 15, 11 L. J. Exch. N. S. 51, 4 Eng. Rul. Cas. 399; Church v. Stevens, 56 Misc. 572, 107 N. Y. Supp. 310; Kraft v. Thomas, 123 Ind. 513, 18 Am. St. Rep. 345, 24 N. E. 346; Fankboner v. Fankboner, 20 Ind. 62; Burnham v. Allen, 1 Gray, 496; Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705; Cousins v. Partridge, 79 Cal. 224, 21 Pac. 745; 7 Cyc. 848, and notes; Palmer v. Palmer, 36 Mich. 489; O'Neil v. Magner, 81 Cal. 631, 15 Am. St. Rep. 88, 22 Pac. 876; Darling v. Wooster, 9 Ohio St. 517; Hitchings v. Edmonds, 132 Mass. 338.

That act makes no effort to change this then almost universal rule, and in terms requires the presentment or demand only in cases where the rights and liabilities of indorsers and of holders in due course are concerned. See §§ 6355, 6372-6376 and 6548, Rev. Codes 1905.

We must presume from these facts that the then almost universal rule of construction was intended to be adopted and adhered to, and that it was the intention of the framers of the negotiable instrument law and of the legislatures that adopted it, that a demand note should,

as between the original makers, be deemed to be due and payable from the very time of its delivery. If a change in the rule is now to be made, it should be made by the legislature, and not by the courts.

If the debt was due at the time of the delivery of the note, the situation was practically the same as if the deposit had been made in the face of an overdraft, the rule of the application of payments would apply, and the right to the offset would exist.

We are not unmindful of § 6288, Rev. Codes 1905, which provides that a banker has a general lien, dependent upon possession, upon all property in his hands *belonging* to a customer, and may apply such funds to the balance due to him from such customer in the course of business, nor of the argument of counsel for appellant that this section seems to expressly limit the lien of the banker to property *belonging* to the customer, while his claim in this case is that the money or deposit belonged to the *cestui que trust*. We doubt, however, whether the statute in question has any application to a general deposit. When a general deposit is made, the bank has not thereafter "property belonging to the depositor" in its possession. The title to and the ownership in the money deposited has passed. The bank is not a bailee of such money; it is a debtor of the depositor merely. *Commercial Bank v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Cent. Bank*, 34 Barb. 298.

The right to apply a past-due note or debt owing to a bank against the claim of a depositor or debt due the depositor from the bank is not indeed, based upon the theory of a lien at all, but upon the theory of offset and application of payments. 5 Cyc. 550.

Sec. 6288, Rev. Codes 1905, in our opinion was merely intended to give, and merely gives, to the bank a lien on papers and securities and special deposits similar to that of the general attorneys' retaining lien. We do not believe that it has any application to a situation such as that before us.

The judgment of the District Court is affirmed.

TAYLOR STATE BANK, a Corporation, and J. F. Christen, v.
Heinrich Baumgartner and C. F. EWALD (sole appellant).

(147 N. W. 385.)

Building contractor — action on bond — judgment — demurrer to complaint — bond — reformation of — action for breach — damages — vacating of judgment — amendment.

Action on a building bond for breach by the contractor of a building contract. From an order vacating a judgment entered upon the sustaining of a demurrer to plaintiffs' complaint, and granting leave to serve and file an amended complaint, defendant Ewald, surety on the bond, appeals. *Held*:

That as the bond and building contract set forth in the complaint, together with the breach of contract therein pleaded, may constitute a basis for an action to reform the bond, and, after reformation, permit a recovery of damages for its breach, the vacating of the judgment, with leave to amend complaint, was proper.

Opinion filed April 24, 1914. Rehearing denied May 18, 1914.

Appeal from an order of the District Court of Stark County, *Crawford, J.*

Affirmed.

Heffron & Baird, and *G. R. Brainard*, for appellant.

The complaint stated no cause of action against appellant, and the district court erred in vacating the judgment for the purpose of permitting plaintiffs to amend their complaint. *Willard v. Mohn*, 24 N. D. 386, 390, 139 N. W. 979, 981; *Boas v. Maloney*, 138 Cal. 105, 70 Pac. 1004; *Lord v. Hopkins*, 30 Cal. 76; *Phillips*, Code Pl. § 311.

On the motion to vacate, plaintiffs should have submitted to the court an affidavit of merits and the complaint as they desired it to be amended; at least a complaint showing a cause of action against appellant. *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Marin v. Potter*, 15 N. D. 284, 107 N. W. 970; 31 Cyc. 373, 374, notes 57, 58, 375 (111a); *Jenkins v. Warren*, 25 App. Div. 569, 50 N. Y. Supp. 957; *Abbott v. Meinken*, 48 App. Div. 109, 62 N. Y. Supp. 660; *Camp v. Pollock*, 45 Neb. 771, 64 N.

W. 231; *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518; *Lasswell v. Kitt*, 11 N. M. 459, 70 Pac. 561; *Swain v. Burnette*, 76 Cal. 299, 18 Pac. 394; *Hayden v. Hayden*, 46 Cal. 337.

On such motion the party must at least inform the court in what particular he desires to amend his complaint. *Barker v. Walbridge*, 14 Minn. 469, Gil. 351.

The plaintiffs are guilty of laches. *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Wannemacher v. Vance*, 23 N. D. 634, 138 N. W. 3.

L. A. Simpson and *M. L. McBride*, for respondents.

Plaintiff was not guilty of delay or negligence, and the cases cited by appellant, if applicable at all, are authorities in support of the plaintiff. *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381.

Goss, J. This is an action to recover of the principal and surety on a bond given contemporaneously with, and intended to insure the faithful performance of the terms of, a building contract, and which contract the complaint shows has been breached by nonperformance of certain conditions thereof. Both the building contract and the contractor's bond are a part of the complaint. The demurrer of the surety to the complaint was sustained, and judgment was entered dismissing the suit as to the surety, evidently on the assumption that the complaint could not be so amended as to state a cause of action against the surety on the bond. The order sustaining the demurrer was dated March 2d, 1912, and judgment was entered thereon March 4th, 1912, upon which latter date, on the application of plaintiff an order to show cause why said judgment just entered should not be vacated was issued, returnable March 14th, when arguments were had thereon, and the decision was taken under advisement by the court, in which condition it remained until September 21st following, when, on the surety's application, another order was issued, returnable four days later, citing plaintiff to show cause why the judgment, concerning the vacation of which no ruling on the motion submitted to vacate the same had been made, should not be confirmed and allowed to stand as the final judgment in the action as between the plaintiff and the surety, Ewald. Upon the

hearing had on this second order to show cause, the court, ruling upon both pending motions, granted the application of the plaintiff and vacated the judgment, but sustained its former ruling on the demurrer, and granted plaintiff leave to serve and file an amended complaint within ten days; from which order defendant Ewald, appeals.

Appellant urges that respondent's omission to serve with the motion to vacate an affidavit of merits and a proposed amended complaint renders irregular and unauthorized the action of the court in vacating the judgment. None of the authorities cited have any application on the record before the court at the time of the vacation of the judgment. No affidavit of merits was necessary, as the plaintiff was not, and could not be, in default, the question being simply that of whether a sufficient cause of action was set forth in the complaint challenged by the demurrer. Upon the court's sustaining the demurrer, the plaintiff was permitted as of course, under the practice prevailing in this jurisdiction, leave to serve and file an amended complaint, provided the original defective complaint shadowed forth a valid cause of action. If it was reasonably apparent from the matter stated in the complaint, including the building contract and surety bond thereto attached and a part thereof, that by an amendment the complaint could be made to state a valid cause of action against the surety, the action of the court in granting leave to serve and file such an amended complaint was a proper exercise of discretion, to deny which would have been an abuse of discretion. The same rule here applies as in actions to vacate judgments where defendant has wholly defaulted. In case of doubt the court should so rule as to permit a trial on the merits, rather than deny relief. Although it is urged that a six months' delay ensued between the submission of the merits, with the motion to vacate, in March, and the final ruling in September, this is not imputable to the parties to the action, and cannot amount to laches on the part of the plaintiff in moving the vacation of this judgment. No authorities cited as sustaining the appellant's contention are applicable. The only question on this appeal is the propriety of the court's order granting leave to serve and file an amended complaint, and this is determined by whether it can be reasonably inferred, from the matter stated in the complaint and attached undertaking and bond, that a cause of action may be stated against the

surety by an amended pleading. This leads to a brief statement of the contents of the building contract and the bond, as the two must be construed together and as one instrument, both by the terms of the bond itself and the rules of law as to the construction of building contracts and bonds. *Bender & Moss, Mechanics' Liens*, § 217; *Utah Lumber Co. v. James*, 25 Utah, 434, 71 Pac. 986.

The building contract provides for the furnishing of labor and material and all things "necessary for the complete construction of said building strictly in accordance with plans, specifications, and details," for an agreed consideration of \$7,540, to be paid according to the conditions of the contract. The complaint charges a failure on the part of the contractor to pay for building material, resulting in a lien for \$2,673 being filed by materialmen upon said building, and the failure of the contractor and the surety to, after demand, procure the discharge of said lien, and that the principal and surety on the bond have therefore violated the terms of the bond. The plans, specifications, and details referred to are not a part of the complaint and are not before us, although mentioned in both the building contract and the building bond, and are to be construed in connection with them. The bond does not bind the principal to perform, nor does it, considered alone, afford the basis for any liability against either the principal or surety. It is plainly evident that the provisions usual to such bonds, obligating the principal and surety to perform the building contract according to the terms of said contracts, plans, and specifications, were omitted, rendering the bond on its face a nullity. It reads as follows:

Know all Men by these presents, That Heinrich Baumgartner, as principal and C. F. Ewald, as surety, of the County of Stark, and Morton and State of North Dakota, held and firmly bound unto Taylor State Bank of Taylor, Stark County, North Dakota, in the sum of Two Thousand 00-100 Dollars lawful money of the United States to be paid to the said Taylor State Bank of Taylor, N. Dak., for which payment well and truly to be made we bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

Dated this first day of September, A. D. 1908.

The conditions of the above obligation are such that Heinrich Baum-

gartner has been awarded the contract for the construction and erection of a brick building, in the village of Taylor, in a first class and workmanlike manner and to provide all the material for the said building according to drawings and specifications prepared by C. A. Bloom of Dickinson, N. D. and signed by the parties thereto on the 1st day of September, 1908, then the obligation to be void; otherwise to remain in full force and virtue.

Heinrich Baumgartner,
C. F. Ewald.

But it does not necessarily follow that the complaint cannot be so amended as to state a cause of action based on the contract, bond, and breach assigned in the original complaint. The purpose of the bond, and that it was to insure performance of the building contract, are apparent from the instruments themselves. Evidently the omission of the usual stipulation in the bond, insuring the performance of the contract according to its terms, was but the mistake of the parties. The complaint discloses that the bond was accepted by the obligee as a bond securing the performance of the building contract, and that thereunder the principal on the bond was suffered to and did attempt to fully perform the conditions of the building contract on his part to be performed, and that after the completion of the building breached the contract, supposedly contrary to the bond. The circumstances of such breach are plead in the complaint. That the bond may be reformed, as between the parties, this plaintiff, the contractor, and surety, under these circumstances, has the support of all authority. Sec. 159, Brandt on Suretyship & Guaranty, and cases and notes in following authorities: 2 L.R.A. 64; 3 L.R.A. 189; 5 L.R.A. 712; 6 L.R.A. 835; 28 L.R.A. (N.S.) 785. A distinction is sometimes made between sureties for a valuable consideration and those which receive none, as to the construction of the bond, as exemplified by note 2, 98 Am. St. Rep. 844; George A. Hormel & Co. v. American Bonding Co. 33 L.R.A. (N.S.) 513 and extensive note thereto (112 Minn. 288, 128 N. W. 12) and also the case of Brown v. Title, Guaranty & Surety Co. 232 Pa. 337, 38 L.R.A. (N.S.) 698, 81 Atl. 410. This surty, Ewald, may have received a valuable consideration for becoming such. But no cases can be found

wherein reformation is denied in the face of a mutual mistake in the instrument, wholly defeating its purpose, as in the instance before us. The rule announced in 34 Cyc. 907, is: "If an instrument fails to embody the actual agreement made or transaction determined upon by the parties thereto, reformation is the proper remedy when a case is made out by proper proof, but the instrument sought to be corrected must fail to express the real agreement or transaction because of mistake common to both parties, or because of mistake on one side and fraud or unequitable conduct on the other." *McCormick Harvesting Mach. Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939; *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301; *Standorf v. Shockley*, 16 N. D. 73, 11 L.R.A. (N.S.) 869, 111 N. W. 622, 14 Ann. Cas. 1099. To deny reformation of this instrument might be to ignore the fact that the same fails to express the real agreement or transaction, as well as to permit the principal and surety to take the unequitable ground that the instrument was not intended as a bond, even though such must have been the only purpose for its execution, and though the principal has been allowed by the obligee, the plaintiff, to erect the building thereunder, with all parties probably relying upon the validity of the bond as insuring proper and full performance of the contract. If it be contended that reformation cannot be had as against the surety, see 34 Cyc. 962, which says that "where a mistake exists in an instrument with sureties, it will be corrected against them just the same as against the principals." If it be urged that reformation must be had in equity, and cannot be had in this action, then the action of the court in vacating the judgment was certainly proper, as the right to equitable relief should not be barred by entry of this judgment at law. Both principal and surety may properly be joined as defendants. An equitable action for reformation must concern the same subject-matter and the same parties. Reformation of the bond may be had in equity and damages for its breach recovered in the same action, the right to recover the latter depending, of course, on equitable relief of reformation being granted. *Pomeroy's Code Remedies*, § 78 reads: "When the plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy and also to a further legal remedy based upon the supposition that the equitable re-

lief is granted, and he sets forth in his complaint or petition the facts which support each class of rights, and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form thus adopted. He may on the trial prove all of the facts averred, and the court will in its judgment formally grant both the equitable and the legal relief. It will be noticed that this proposition embraces only those cases in which the legal relief demanded rests upon, and flows as a consequence from, the prior equitable relief, but the principle of the rule is not confined to such cases; it extends also to those in which the two remedies, although connected with the same transaction or subject-matter, are not connected as cause and effect. This is the most complete union of legal and equitable primary rights and remedies in one action which can be made; but it is limited and restricted to those cases in which these rights and remedies arise from the same transaction or subject-matter. It is not generally possible to join one legal cause of action with another entirely independent, equitable cause of action, there being no antecedent connection between the two." See also §§ 79 to 83, same authority. This is the rule in all states except Missouri and Wisconsin. *Butler v. Barnes*, 12 L.R.A. 273 and note (60 Conn. 170, 21 Atl. 419) and § 6767, Rev. Codes 1905, in connection with 34 Cyc. 964, subdiv. 3, and 34 Cyc. 906, D, and cases cited.

It is not necessary to further pursue the inquiry as to whether the complaint, considered with the building contract and bond, may be amended to state a cause of action. Counsel for the appellant base their appeal upon the following argument: "No 'construction' or twisting or the wildest flight of imagination can find anything in that 'undertaking' upon which to base a liability by Defendant Ewald to plaintiffs, and therefore no pleading or amendment thereto can possibly state a cause of action against said defendant." If this be true, appellant should prevail, but counsel has erroneously assumed that the undertaking cannot become a basis for liability. The order of the trial court vacating the judgment ordered and entered on demurrer, and granting plaintiff permission to serve and file an amended complaint, is affirmed. Respondent will recover costs of this appeal.

B. F. SPALDING. I concur in the result.

E. DELAFIELD SMITH v. E. R. BRADLEY and Grace E. Bradley.

(147 N. W. 784.)

Smith brings foreclosure of a purchase-price real-estate mortgage given by Bradley mortgagor as a part performance of a decree of specific performance of a contract for sale of land by Smith, including buildings, fencing, and an assignment of lease. Smith then refused to assign lease. Pending specific performance, Smith had injured and removed buildings from the land sold, and for which Bradley offset damages against this foreclosure debt. *Held:*

Acceptance of deed — contract — full performance — partial breach — damages.

1. Bradley's acceptance of Smith's deed was not taken in full performance of the contract, still executory as but partially performed, and for partial breach of which actual damages sustained may be recouped.

School lands — lease — default — damages.

2. Defendant is denied recovery for nonassignment of school leases, as for three years after Smith's default the school land in question was not leased to anyone, and which fact inquiry would have disclosed. Bradley could have received by a lease from the state all he would have obtained by an assignment of a similar lease from Smith, and therefore has suffered no damages, except as a result of his own failure to exercise ordinary diligence.

Counterclaim — reduction — foreclosure — judgment.

3. With a reduction of \$960 and interest on the counterclaim allowed, judgment of foreclosure is awarded.

Costs— disbursements — appeal.

4. Appellant Smith will recover costs and disbursements of trial in district court and on this appeal.

Opinion filed May 19, 1914.

Appeal from the District Court of Foster County, *Coffey, J.*
Modified and affirmed.

T. F. McCue, for appellant.

This is a proper case for trial *de novo* in the supreme court, upon all proper evidence offered. All other evidence to which proper objection was made will not be considered. *Nichols & S. Co. v. Stangler*, 7 N. D. 102, 72 N. W. 1089.

Damages growing out of an alleged tortious act cannot be offset against plaintiff's damages growing out of contract, and breach thereof. *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133, and cases therein cited.

Until a deed is accepted by the grantee, no delivery can be claimed. *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 4 Pac. 106.

A compromise of the matters in dispute was actually made and acted upon, and the law will not permit the parties to dispute it. *Proctor v. Heaton*, 114 Ind. 250, 15 N. E. 21; *Cobb v. Arnold*, 8 Met. 403; *Paxson v. Hewson*, 14 Phila. 174.

A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all obligations arising from it, so far as the facts are known or ought to have been known to the person accepting. *Rev. Codes 1905*, § 5310; *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047; *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201, 31 Pac. 290.

The rights of one who accepts a deed with knowledge of all attendant material facts are fixed by the deed. *Hunt v. Clark*, 46 Iowa, 291; *Houghtaling v. Lewis*, 10 Johns. 296; *Farmers' & M. Bank v. Galbraith*, 10 Pa. 490, 51 Am. Dec. 498; *Shontz v. Brown*, 27 Pa. 131; *Andrus v. St. Louis Smelting & Ref. Co.* 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep. 645; *Devlin, Deeds*, 2d ed. p. 293, § 264; Citing: *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 4 Pac. 106; *Harrington v. Gage*, 6 Vt. 532; *Mitchell v. Bartlett*, 51 N. Y. 453; *Jackson ex dem. Griswold v. Bard*, 4 Johns. 230, 4 Am. Dec. 267; *Bryan v. Swain*, 56 Cal. 616; *Carter v. Beck*, 40 Ala. 599; *Cronister v. Cronister*, 1 Watts & S. 442; *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753; *Jones v. Wood*, 16 Pa. 25; *Gibson v. Richart*, 83 Ind. 313; *Frederick v. Youngblood*, 19 Ala. 680, 54 Am. Dec. 209; *Smith v. Fitzgerald*, 59 Vt. 451, 9 Atl. 604.

A grant of land only includes the property in the condition that it is in at the date of delivery and acceptance of the deed. *Muscogee Mfg. Co. v. Eagle & P. Mills*, 126 Ga. 210, 7 L.R.A.(N.S.) 1139, 54 S. E. 1028; *Gregg v. Sayre*, 8 Pet. 244, 8 L. ed. 932; 9 Am. & Eng. Enc. Law, 2d ed. 161; *United States v. LeBaron*, 19 How. 75, 15 L. ed. 526.

One who tacitly encourages an act to be done cannot afterwards exercise his legal right in opposition to such consent, where, by such acts

and conduct, the other party was induced to and did change his position to his detriment. *Swain v. Seamens*, 9 Wall. 272, 19 L. ed. 560.

Having gone into possession of the land, the defendant accepted it in its then condition, and was required to turn over the notes and mortgage. *Cary v. Wheeler*, 14 Wis. 282; *Terry v. Munger*, 121 N. Y. 161, 8 L.R.A. 216, 18 Am. St. Rep. 803, 24 N. E. 272.

He who by his acts or language leads another to do what he would not otherwise have done shall not subject such person to loss or injury. *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *McDonald v. Beatty*, 10 N. D. 520, 88 N. W. 281; *Brigham Young Trust Co. v. Wagener*, 13 Utah, 236, 44 Pac. 1030; *Tolerton & S. Co. v. Casperson*, 7 S. D. 206, 63 N. W. 908; *Bigelow, Estoppel*, p. 560.

Findings must be supported by competent evidence. *Sykes v. Beck*, 12 N. D. 261, 96 N. W. 844; *Shambaugh v. Current*, 111 Iowa, 121, 82 N. W. 497; *Randall v. Thornton*, 43 Me. 226, 69 Am. Dec. 56; *Shepherd v. Gilroy*, 46 Iowa, 193; *Mast v. Pearce*, 58 Iowa, 579, 43 Am. Rep. 125, 8 N. W. 632, 12 N. W. 597.

Damages cannot be hypothecated upon mere inference or speculation. *Barron v. Northern P. R. Co.* 16 N. D. 277, 113 N. W. 102.

The contract itself must furnish the measure of damages. *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125; *Davis v. Tubbs*, 7 S. D. 488, 64 N. W. 534; *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

One is bound to minimize the damages, when he can do so by a small expenditure. *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387; *Little v. McGuire*, 43 Iowa, 447; *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

Edward P. Kelly, for respondents.

The tort may be waived, and suit brought as upon contract. *Clark. Contr.* pp. 693-695.

Or damages arising out of a tortious act may be offset or counter-claimed. *Fleckten v. Spicer*, 63 Minn. 454, 65 N. W. 926; *Vallentyne v. Immigration Land Co.* 95 Minn. 195, 103 N. W. 1028, 5 Ann. Cas. 212; *Arentsen v. Moreland*, 122 Wis. 167, 65 L.R.A. 973, 106 Am. St. Rep. 951, 99 N. W. 790, 2 Ann. Cas. 628.

Even though plaintiff's failure to perform the contract as agreed was not the result of fraud, still defendant has the right to stand on the

contract as made, and is entitled to damages for failure to perform. *Ibid*; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; *Seymour v. Cushman*, 100 Wis. 590, 69 Am. St. Rep. 957, 76 N. W. 769; *Mississippi River Logging Co. v. Miller*, 109 Wis. 77, 85 N. W. 193.

The covenants and conditions of the executory contract upon which defendant B. relies are independent of the warranties in the warranty deed subsequently accepted, and are collateral covenants, and as such do not merge in the deed. *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302; *Sandford v. Travers*, 40 N. Y. 140; *Remington v. Palmer*, 62 N. Y. 31; *Sage v. Truslow*, 88 N. Y. 240; *Bull v. Willard*, 9 Barb. 641; *Cox v. Henry*, 32 Pa. 18; *Selden v. Williams*, 9 Watts, 9; *Atwood v. Norton*, 27 Barb. 638.

The provisions of the contract not included still remain in force. *Lehman v. Paxton*, 7 Pa. Super. Ct. 259; *Close v. Zell*, 141 Pa. 390, 23 Am. St. Rep. 296, 21 Atl. 770; *Walker v. France*, 112 Pa. 203, 5 Atl. 208; *Brinker v. Byers*, 2 Penr. & W. 528; *Sessa v. Arthur*, 183 Mass. 230, 66 N. E. 804; *Minor v. Edwards*, 12 Mo. 137, 49 Am. Dec. 121; *German American Real Estate Co. v. Starke*, 84 Hun, 430, 32 N. Y. Supp. 403; *Davis v. Lee*, 52 Wash. 330, 132 Am. St. Rep. 973, 100 Pac. 752.

Goss, J. Smith brings this action to foreclose a purchase-price real-estate mortgage. May 12, 1906, he gave Bradley an option contract in writing on a section of land, which was accepted. Smith then refused to perform under the contract, whereupon specific performance was brought, and speedily went to judgment in Bradley's favor October 17, 1906. Therein assignments of certain school leases, stipulated for in the option, were treated as collateral to the contract of purchase, and Bradley was permitted to receive performance from Smith without such assignments. The failure to assign these leases is here the basis for a claim of damages by Bradley. Smith appealed from the judgment in specific performance, but his appeal was dismissed. February 17, 1907, pending that appeal, Bradley secured possession of the land sold, and has since retained it. After the appeal was dismissed the attitude of the parties changed, and Smith became anxious for specific performance of the decree, and to secure possession of the purchase-

price mortgage and notes, but Bradley refused to sanction or permit delivery of them until Smith should pay him for the damages now sought to be recovered, and remained in possession of both the farm and his notes and mortgage until 1909. Smith then served Bradley with notice that, if the decree was not at once complied with, Smith would treat further noncompliance as a waiver by Bradley of all benefits under that decree. Smith then sued Bradley to quiet title to the land in Smith, as against the decree, claiming Bradley to have forfeited his rights thereunder. The answer set up title in Bradley under the judgment decreeing specific performance. No issue of damages was raised. Negotiations then had resulted in a written stipulation dismissing the action to quiet title. Specific performance as to the section of land was then had, Bradley accepting the deed, and Smith the purchase-price mortgage and notes June 10, 1909. In November following, Smith brings foreclosure of this mortgage. Bradley answers, reciting the circumstances under which the notes and mortgages were delivered, and that the same was in performance of the option contract, and seeks by recoupment to recover the sum of over \$4,000 claimed as his damages because Smith failed to deliver his assignments of school leases and fencing on the school land, and for Smith's removal of and injury to buildings and improvements on the land so deeded to Bradley. Judgment of foreclosure was awarded plaintiff for the sum of \$9,543.60, less damages \$2,020.99, allowed Bradley as an offset. From this judgment Smith appeals. Retrial is demanded of such award of damages.

The first question raised is as to whether Bradley, after the settlement of the action to quiet title, and after his acceptance of Smith's deed and his delivery to Smith of this mortgage, under the decree of specific performance, now can assert any claim to damages, as against Smith's foreclosure for the purchase price.

No issue of damages has ever been involved in any previous action. Undoubtedly, had the damages accrued prior to the trial of the action of specific performance, as to which there is no proof, inasmuch as possession was taken four months later and damages were then first ascertained, Bradley could have litigated damages in the action of specific performance, had he so desired. Waterman on Specific Per-

formance of Contracts, § 5: "A person may be entitled to damages for violations of the contract up to the time of bringing the suit, with specific performance for the future; or to specific performance generally and damages for acts which do not admit of a decree for specific performance;" or, as stated in 36 Cyc. 753, "the court, having acquired jurisdiction, may, as incidental to the remedy, assess such damages as appear to have been sustained by plaintiff." But, instead, plaintiff could elect to recoup for damages sustained when payment of the purchase price is sought to be enforced by foreclosure; Warvelle, Vend. & P. §§ 962, 963; Eppstein v. Kuhn, 10 L.R.A.(N.S.) 117 and note (225 Ill. 115, 80 N. E. 80); also note in 10 L.R.A.(N.S.) 125.

Bradley has done nothing to waive his cause of action for these damages or to estop himself from now asserting them. They were not involved in the action for specific performance, and did not need to be there litigated, and that judgment in no wise interferes with the subsequent recovery of damages, nor, that being true, did the acceptance of the deeds and delivery of this mortgage estop Bradley from claiming damages for noncompliance with the contract so specifically enforced by judgment, where such damages claimed arose subsequent to the contract and from Smith's injury to, or waste or spoliation of, the property the subject of the contract. Phinizy v. Guernsey, 50 L.R.A. 680 and note, 78 Am. St. Rep. 207 and note (111 Ga. 346, 36 S. E. 796); note to Hawkes v. Kuhn, 10 L.R.A.(N.S.) 125. Bradley had the right to elect to specifically perform the contract and make Smith respond in damages as for breach of contract for so much of the property as Smith was unable to deliver as he had contracted to do, which in this instance applies to certain buildings and water tanks removed from the section, and for Smith's conceded inability to perform by assignment of school leases, and for his sale of fences off of said school land subsequent to his contracting to convey those fences to Bradley. In other words, Bradley could elect to obtain, as he has done, the specific property, so far as specific performance could be had, and also to recover damages for breach of that portion of the contract for which he had not received consideration by the partial performance. Warvelle, Vend. & P. §§ 962, 963; 50 L.R.A. 680; note to 10 L.R.A.(N.S.) 125; Melin v. Woolley, 22 L.R.A.(N.S.) 595 and note (103

Minn. 498, 115 N. W. 654, 946); *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026. *Knudtson v. Robinson*, 18 N. D. 12-17, 118 N. W. 1051, also recognizes such to be the law, but refuses application for want of mutuality of the contract there sought to be enforced. And this disposes of all questions of tort sought to be raised by appellant, as this is an action for breach of contract, and not one sounding in tort.

Appellant next quotes § 5310 Rev. Codes 1905, that "a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting," and asserts that Bradley cannot be heard to urge damages as a recoupment to the purchase-price mortgage, because he accepted Smith's deed and derived all the benefits thereunder, with full knowledge of the previous damage done the buildings and property, and that the acceptance of the deed estops Bradley from asserting his counterclaim. The answer is, as heretofore stated, that Bradley accepted the deed under the decree of specific performance, permitting him to do so, and such acceptance would not, in the absence of express or implied contract, constitute a waiver of his right of action for damages for injury to property committed subsequent to the entering into the contract so specifically enforced, unless Bradley should have litigated the issue of damages in the action for specific performance, and this he was not obliged to do. To the extent that Smith has failed to deliver the property covered by the option contract, and in the condition contracted for, under the evidence that contract is still executory, notwithstanding its partial performance by delivery of deeds. It is for damages for matters collateral to the title transferred by deed that Bradley seeks recovery as for partial default in performance. *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302; *Lehman v. Paxton*, 7 Pa. Super. Ct. 259; *Selden v. Williams*, 9 Watts, 9; *Sage v. Truslow*, 88 N. Y. 240; *Remington v. Palmer*, 62 N. Y. 31; *Atwood v. Norton*, 27 Barb. 638. The general rule on merger of contract in deed, illustrated by *Clifton v. Jackson Iron Co.* 16 Am. St. Rep. 621 and note (74 Mich. 183, 41 N. W. 891) has no application. *Andrus v. St. Louis Smelting & Ref. Co.* 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep. 645.

Nor did the dismissal, by mutual agreement, of the action to quiet title, and the delivery of the deed and mortgage, operate in law as a full performance by Smith of the terms of the then executory contract, specific performance of which had been decreed, and which contract was established in such decree, and which decree permits Bradley to accept a partial performance, provided Smith could not assign the school leases. From the decree itself, and from all the testimony, including that of Smith's own counsel, it appears that Bradley insisted upon reserving his cause of action for damages for the partial breach of performance of the executory contract, notwithstanding delivery of the deed and dismissal of the action to quiet title. Such dismissal, and simultaneous exchange of papers, did not operate to waive by contract the right of action already accrued in Bradley, because of Smith's partial breach concerning the school lands and his prior injury to buildings on said real property. The abandonment by Smith of his rights under his action to quiet title, if any he had, might have constituted a contract consideration for the waiver, by Bradley, of his right of action against Smith for partial breach of performance; but it is not contended, and the testimony does not establish, such a waiver by Bradley, nor any intent on his part to procure dismissal of such action on the other party's belief that Bradley was releasing such claim. This is not a case where a deed called for by an executory contract was delivered and received as a full compliance with the contract. Whether acceptance of deeds without protestation would have, by operation of law, satisfied the contract of sale as to the land to be purchased, is not necessary to determine. It certainly would not have done so as to the school leases and fencing. Respondent was entitled to recoup against the mortgage debt all damages he has suffered through breach of the contract of sale.

Appellant has assigned error in the allowance of \$230.98 as damages for removal of water tanks, car house and chicken house. This property was upon the premises, and constituted buildings or improvements thereon. Smith asserts he never owned them, and that they were removed from the premises by the tenant. Bradley testifies that, before signing the contract, in company with Smith, he examined the premises with reference to the improvements thereon, and Smith rep-

resented he was the owner of all these improvements then there situated. Smith's proof that he did not own them but indisputably establishes the breach of his contract to convey them. The evidence sustains this recovery.

The remaining assignment relates to damages for Smith's failure to assign school leases, and for his refusal to deliver the fence on the school land. For these items the court allowed Bradley \$960 damages as "the reasonable value of the use and occupation of the premises included in the school land lease for the period of five years," and the additional sum of \$152 as "the value of fencing upon said school land," with interest on both items from February 17, 1907. The contract reads: "You are also to have lease on school land on one half-section joining this land, and the fencing thereon, at price of \$200 cash." Bradley deposited \$200 cash with the clerk in the action for specific performance, in which he was granted specific performance without taking over the lease, and he went into possession of the farm February 17, 1907, under the decree, and subsequently withdrew his \$200 deposit.

Owing to the large award for these items, the substance of all evidence thereon follows: There was $2\frac{1}{2}$ miles of fence, 4 wires high, strung on 444 large fence posts, each 5 inches in diameter and 7 feet long. Bradley offers proof that it took 60 days' work, at an average of \$1.75 per day, or \$105 for wages, in building it; that it contained 40 spools of wire, worth new \$3 per spool, or \$120. No proof of the value of the posts appears in the record. The fence was built in 1905, and must have been in good condition. Bradley's testimony is that this fencing alone was worth on that farm at least \$350, and seems not to be an excessive valuation; but from this should be deducted the purchase price, \$200. Bradley's actual damage for failure to receive this fencing is \$150 under his testimony, which amount is found to be his damages for this item.

The damage assessable for breach of the agreement to convey the school leases is the final question. Assume Bradley's testimony as true, that he was told by Smith at the time of the sale that he had a five years' lease on the school land, and he was given to understand by Smith that the leases still had five years to run. At the end of the first

season, after judgment in the action for specific performance, Smith had repeatedly refused to assign and had informed Bradley that, "on looking it up he discovered that he had no lease whatever to the land, and it was absolutely impossible for him to furnish it;" which is the fact, and in the decree of specific performance Bradley was given the option of doing as he did in February, 1907, accepting the section purchased without requiring an assignment of the school leases; that Bradley was kept out of possession, during the season of 1906, of both the section purchased and the school land, of which Smith was in possession. From the uncontradicted testimony of the County Treasurer, the public official charged by law with the leasing of the school lands in question, it is shown that this land was not leased during the years 1906, 1907, and 1908, but was vacant, unoccupied, and unclaimed, and that anyone could have leased it at the prescribed charge of \$30 per year for the half-section. Bradley was presumed to know the law which informed him of where to find the public records in his own county and at the state capital, as to the leasing of these lands. From such records he could at any time have ascertained the fact that this land was open to leasing for a nominal sum. He testifies to consulting the land department at Bismarck, and learning that this land had not been leased for a number of years subsequent to 1905. He asserts he did not learn of this until "after the litigations," but he does not show any diligence on his part to ascertain whether he could lease the land from the state or not, during the years after 1906. It is but a fair inference that he either neglected or purposely refrained from such inquiry. Exercise of reasonable business precaution would have disclosed to him that the land was lying open subject to his taking. His failure to inquire and learn these facts during this long period of time discredits his testimony when we consider the business judgment used by him, throughout these years, concerning all the other many details. The only reasonable conclusion is that, though he may not have learned to a certainty that the lands were open to leasing, he surmised that such was the fact, and purposely refrained from ascertaining the facts, not wanting to know them. This evidences an intent to mulct Smith in damages, and a studied purpose to refrain from doing anything meanwhile to lessen amount of recovery. Since Bradley had the privilege

open to him to lease this land, and thereby procure exactly what he would have obtained by an assignment of the leases, with a possible advantage of an added term of leasehold at his election, he should not be allowed compensatory damages for failure of Smith to vest in him a leasehold interest. Where injury could thus have been avoided by exercise of reasonable diligence, equity should deny relief by damages. Note to Vallentyne v. Immigration Land Co. 5 Ann. Cas. 214, citing much authority. For these reasons the \$960 item allowed for damages for failure to assign leases, together with all interest allowed thereon, should be disallowed. This deduction leaves a total valid counterclaim of Bradley of \$660.99 (including the items in findings not challenged on appeal), and consisting of property removed, water tanks, \$80; car house \$114.12; chicken house \$46.86; outbuilding \$28.29; repairs to barn \$133.58; fencing destroyed on farm \$118.14; value fencing on school land \$150; or a total of \$660.99, found as due Bradley under the terms of decree of specific performance on December 2, 1906, which amount, \$660.99, should be credited as of December 2, 1906, upon the purchase-price mortgage, leaving due December 2, 1906, on the first note, \$323. Plaintiff's mortgage debt consists of \$323, with interest thereon at 8 per cent per annum from December 2, 1906, together with the total of all remaining notes, amounting to \$5,990, on October 17, 1906, with 8 per cent interest from that date thereon to date of entry of judgment, amounting to a total mortgage debt on May 17, 1914, of \$10,139.67, to which should be added taxes for 1906 paid by plaintiff January 8, 1909—\$22.94—and 7 per cent interest thereon to date of judgment to be entered herein. To this amount of principal and interest due at entry of final judgment there should be added attorney fees on foreclosure allowable to Smith and computed pursuant to § 7176, Rev. Codes 1905 (approximately \$250), for all of which, together with Smith's costs and disbursements upon district court trial and upon this appeal (including amount actually paid for printing of his abstract and brief, not exceeding the rate allowed under the rules at the time of the filing thereof, in April, 1913), the usual judgment with decree of foreclosure will be entered in favor of plaintiff and appellant and against the defendants and respondents.

BURKE, J., disqualified, not participating.

JOHN F. WALD v. S. W. WHEELON and FARMERS STATE
BANK OF TOWNER, NORTH DAKOTA.

(147 N. W. 402.)

State bank — customer — state law as to loan limit — knowledge of.

1. A customer doing business with a state bank is charged with knowledge of the law relating to the amount that can be loaned to one person.

Contract to perform unlawful acts — unenforceable — general rule.

2. As a general rule, contracts to perform acts forbidden by express statute, or which subject the parties to punishment, are unenforceable. To this rule there are some exceptions.

Legislative intent — statute — banks — individual loan — limitation — construction.

3. Where the intent of the legislature in enacting a statute limiting the size of individual loans was to protect depositors and other customers of the bank, the law will be so construed as to give effect to the legislative intent.

Contract for performance of criminal acts — action for damages for breach — case — established — illegal transaction.

4. One of the tests applied to determine whether an action for damages can be maintained for the breach of a contract calling for the performance of criminal acts is, Can the plaintiff establish his case otherwise than through the medium of the illegal transaction to which he himself was a party?

Executory contract — bank — customer — excessive loan — illegal — failure to perform — damages — not recoverable.

5. An executory contract made between the bank and a customer, in which the bank agrees to make the customer a loan in excess of the amount which it is permitted by law to loan to one person, subjects the officers of the bank, if the loan is made, to conviction and fine, under the provisions of § 4668, Revised Codes of 1905, and the bank to a forfeiture of its franchise under § 4663, Revised Codes of 1905. *Held*, that by reason of these provisions, a loan in excess of 15 per cent of the capital and surplus of the bank to one individual would be illegal, and that, therefore, a contract to make such a loan, when violated, does not subject the bank to damages for its breach.

Failure to make excessive loan — action for damages — illegal contract — no recovery.

6. Applying the principles above announced to the facts in this case, it is

Note.—For authorities on the question of the liability of bank directors in case of bad loans, see notes in 55 L.R.A. 751, and 39 L.R.A.(N.S.) 173.

held that the plaintiff cannot recover in an action against the defendant bank for damages for failure to make a loan which it is alleged the cashier of the bank agreed to make, in excess of the limit fixed by law.

Opinion filed April 1, 1914. Rehearing denied May 20, 1914.

Appeal from judgment of the District Court of McHenry County,
Hon. A. G. Burr, Judge.

Reversed.

Christianson & Weber, Engerud, Holt & Frame, and *J. F. Callahan*,
for appellant.

The insufficiency of the evidence to establish the alleged agreement might be remedied on another trial, and hence, though it would be a ground for a new trial, it would not justify a judgment *non obstante veredicto*. *Meehan v. Great Northern R. Co.* 13 N. D. 441, 101 N. W. 183.

In any event, the agreement alleged was unlawful, and unenforceable, because its execution involved the commission of a crime. *Rev. Codes 1905, §§ 4657, 4658.*

An agreement to do something which the law forbids cannot be made the basis of a cause of action. *Arnot v. Pittston & E. Coal Co.* 2 Hun, 596; *Stover v. Flower*, 120 Iowa, 514, 94 N. W. 1100; *Weston v. Estey*, 22 Colo. 334, 45 Pac. 367; *Swindell v. Bainbridge State Bank*, 3 Ga. App. 364, 60 S. E. 13; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

The defendant bank was not bound by the agreement, because it was not within any authority of the cashier to make it. *Corey v. Hunter*, 10 N. D. 5, 84 N. W. 570; *First Nat. Bank v. Michigan City Bank*, 8 N. D. 612, 80 N. W. 766; 31 Cyc. 1643, 1644.

The same rule that governs the acts of agents of individuals governs the acts of cashiers of banks. *Morse, Banks & Bkg.* 2d ed. pp. 155, 195 et seq.; 5 Cyc. 457, 463, 464 et seq.; *First Nat. Bank v. Michigan City Bank*, 8 N. D. 612, 80 N. W. 766.

Plaintiff must make it appear that the acts of the cashier were within his authority. *State v. Commercial Bank*, 6 Smedes & M. 218, 45 Am. Dec. 280.

A person dealing with the cashier of a bank is bound, at his peril, to
27 N. D.—40.

see that the cashier is acting within his authority. *Corey v. Hunter*, 10 N. D. 12, 84 N. W. 570; Rev. Codes, §§ 5769, 5770.

There is no ratification, and there could be no estoppel to the right to question the validity of a contract to commit a crime. *Swindell v. Bainbridge State Bank*, 3 Ga. App. 364, 60 S. E. 13; Rev. Codes, §§ 5772, 5775; 31 Cyc. 1244, and cases cited in note, 78, 1652 et seq; *State v. Commercial Bank*, 6 Smedes & M. 218, 45 Am. Dec. 280; *Greenawalt v. Wilson*, 52 Kan. 109, 34 Pac. 403; *Leggett v. New Jersey Mfg. & Bkg. Co.* 1 N. J. Eq. 541, 23 Am. Dec. 728; *Chadbourne v. Stockton Sav. & L. Soc.* 4 Cal. Unrep. 535, 36 Pac. 127; *Wheat v. Bank of Louisville*, 9 Ky. L. Rep. 738, 5 S. W. 305; *United States v. City Bank*, 21 How. 356, 18 L. ed. 130; *Bank of Commerce v. Hart*, 37 Neb. 197, 20 L.R.A. 780, 40 Am. St. Rep. 479, 55 N. W. 631; *North Star Boot & Shoe Co. v. Stebbins*, 2 S. D. 74, 48 N. W. 833; *Lloyd v. West Branch Bank*, 15 Pa. 172, 53 Am. Dec. 581, 1 Am. Neg. Cas. 574; *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367; *Davies County Sav. Asso. v. Sailor*, 63 Mo. 24; *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. ed. 316; *Sturdevant Bros. v. Farmers' & M. Bank*, 69 Neb. 220, 95 N. W. 819.

H. B. Senn and A. E. Coger, for respondent.

It is no defense, that a contract by a bank to loan in excess of the law limit is unlawful and unenforceable, where the contract has been executed. *Anderson v. First Nat. Bank*, 4 N. D. 182, 59 N. W. 1029; 5 N. D. 80, 64 N. W. 114; 5 N. D. 451, 67 N. W. 821; 6 N. D. 497, 72 N. W. 916, 172 U. S. 573, 43 L. ed. 558, 19 Sup. Ct. Rep. 284.

If the bank has violated the law it can only be taken advantage of by the sovereign power that created the bank. *Anderson v. First Nat. Bank*, 172 U. S. 573, 43 L. ed. 573, 19 Sup. Ct. Rep. 284, 5 N. D. 455, 67 N. W. 821; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909; *First Nat. Bank v. Smith*, 8 S. D. 7, 65 N. W. 437; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 850; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496;

Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; Walden Nat. Bank v. Birch, 130 N. Y. 221, 14 L.R.A. 211, 29 N. E. 127.

It is the law that the security is not void because the loan is in excess of the law limit. A party who has received the benefit of an agreement cannot question its validity. Smith v. First Nat. Bank, 45 Neb. 444, 63 N. W. 796; State ex rel. Clapp v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 3 L.R.A. 510, 41 N. W. 1020; Mills County Nat. Bank v. Perry, 72 Iowa, 15, 2 Am. St. Rep. 228, 33 N. W. 341; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Union Gold-Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432; 5 Cyc. 523; First Nat. Bank v. Flath, 10 N. D. 285, 86 N. W. 867; Fortier v. New Orleans Nat. Bank, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234; Neilsville Bank v. Tuthill, 4 Dak. 295, 30 N. W. 154.

The plea of *ultra vires* will not avail to either party, where the contract has been fully executed by the other party. First Nat. Bank v. Bakken, 17 N. D. 224, 116 N. W. 92; Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

The plea of *ultra vires* cannot be set up to defeat a recovery upon negotiable paper bought by a bank. First Nat. Bank v. Smith, 8 S. D. 101, 65 N. W. 439; Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909; Merchants' Nat. Bank v. Hanson, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849.

SPALDING, Ch. J. Can there be a recovery of damages for the violation of a contract, the execution of which would constitute the commission of a crime by the officers of the defendant? This is the question to be considered on this appeal. For an understanding of the facts, we may state that the action was brought to recover damages for the failure of the defendant, a state bank, to make a loan to the plaintiff as agreed, and therewith to pay the sheriff of McHenry County March 15, 1910, the sum necessary to effect a redemption of certain real estate from a foreclosure sale, and for which the time of redemption expired on such date, and which, it is alleged, went to sheriff's

deed by reason of defendant's breach of contract. Damages in the sum of \$6,500 were demanded. The answer denies any contract whatsoever with respect to the payment of any obligations of the plaintiff, or any liens or foreclosure against the property; and as a further defense it is alleged that the defendant is a banking corporation organized under the laws of this state, and that the contract set forth in the complaint was wholly beyond the power and authority of any officer of the defendant to enter into by or on the behalf thereof, and wholly in excess of the powers of the defendant bank, and therefore void and unenforceable. One Wheelon, cashier of the bank, was made a party defendant, but in the course of the trial the action was dismissed by consent as to him. A verdict for \$500 was rendered in favor of plaintiff, and judgment entered thereon. This appeal is from the judgment, and also from an order denying defendant's motion for judgment notwithstanding the verdict. In this court the only distinctive assignments of error insisted upon are the second and third, raised in the motion for a directed verdict. These points are that the agreement alleged would be unlawful and consequently void and unenforceable, because its execution necessarily involved the commission of a crime, and, second, because the bank was not bound by the agreement, as the making of such an agreement was not within the express, implied, or ostensible authority of the cashier. We do not find it necessary to consider separately the last point, as it necessarily follows, from our conclusion on the first point, that it is well taken. It appears that the plaintiff had various conversations with Wheelon, the cashier, with reference to the bank making a loan sufficient to take up the indebtedness against his property and save it from going to sheriff's deed. There were a number of mortgages against it, and over \$4,000 was needed. For the purpose stated, an application and papers were executed for a loan of \$4,000, which Wheelon thought he could procure. It appears that in the attempt to make this loan, Wheelon, either on his own behalf, or on behalf of the bank, was only acting as a negotiator; that it was not proposed that the bank itself make the loan. Wheelon found it impossible to secure \$4,000 on the security offered. New papers were prepared for a loan of \$3,000, or a trifle over, the mortgage or mortgages and notes running to the

bank. The plaintiff was to raise by other means something like \$1,300, or enough, when added to the proposed loan, to make possible the redemption and the lifting of certain other mortgages on the property. As to the merits, we may say in passing that the evidence to sustain the verdict is, at the best, very slight. It discloses considerable uncertainty as to whether the minds met, as to what was to be done with reference to the additional amount to be raised by plaintiff. On his part, it tends to show that something was to be done by the bank, while, on the other hand, Wheelon claims to have understood that the plaintiff was to raise his part and then call on the bank, so they could co-operate in making redemption and in discharging the mortgages. Defendant's evidence is emphatic on this point. The papers were sent to a bank in another town for execution, for the accommodation of the plaintiff. They were executed before the cashier of that bank, and were by him placed in a basket in the bank where the employees of the bank deposited mail intended to be taken to the postoffice. No showing is made as to what became of them, but they were supposed to have been taken from the basket by somebody and mailed, and a copy of a letter written by the cashier of that bank was received in evidence, but there is no proof that the papers were in fact mailed. Wheelon testifies on behalf of the defendant that the defendant bank never received them. By reason of failing to receive the executed papers, or to hear from the plaintiff, it seems to have assumed that he had abandoned the deal, and therefore did nothing toward making a redemption, and the land went to deed. This recitation shows the circumstances surrounding the transaction. We do not understand it to be controverted that defendant, through the cashier Wheelon, agreed to make the loan. It is stipulated that the capital and surplus of the defendant was \$12,000. Under the prohibitions of § 4657, Rev. Codes 1905, the most that the defendant could loan to any one person was \$1,800, and by § 4668, Rev. Codes 1905, any officer of any banking association loaning to one person more than 15 per cent of its capital and surplus actually paid in is subject on conviction to a fine of not less than \$50 nor more than \$500. Hence, if this loan had been made, the cashier and any other officer of the bank participating in negotiating it would have been subject to prosecution for violation

of this provision, and under the provisions of § 4663, Rev. Codes 1905, a forfeiture of the bank's franchise would have been worked. The plaintiff was charged with knowledge of the limitation of the amount which the bank could loan to one person. This is well established by authority. He is chargeable with knowledge of the law and of the amount of any loan which can lawfully be made on the capital and surplus possessed by the bank. There is a distinction between cases in which knowledge or constructive notice is furnished by public records and the statute, and those cases in which some fact not disclosed in that manner may affect the transaction. If the borrower must go to the records of the bank or sources extrinsic, the law, or public records, he may not be charged with notice of the limitations of the bank's authority; as, for instance, if he were seeking to secure a loan which the bank might ordinarily make, but which, by reason of the depletion of the reserve required by statute to be maintained, it was not permitted by law to make, and made a contract for such a loan, and such a contract was violated by the bank, he probably would not be charged with notice of the condition of the reserve; but in the case at bar, the law and the public records give complete information as to the authority of the bank to make a loan of any given size. *Mutual Guaranty F. Ins. Co. v. Barker*, 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868; *Bailey v. Methodist Episcopal Church*, 71 Me. 472; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; *Bissell v. Michigan Southern & N. I. R. Cos.* 22 N. Y. 258; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Chambers v. Falkner*, 65 Ala. 448; *Hood v. New York & N. H. R. Co.* 22 Conn. 1; *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626; *Memphis Grain & Package Elevator Co. v. Memphis & C. R. Co.* 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52; *Swindell v. Bainbridge State Bank*, 3 Ga. App. 364, 60 S. E. 13; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39; *Ossipee Hosiery & Woollen Mfg. Co. v. Canney*, 54 N. H. 295.

In *Anderson v. First Nat. Bank*, 5 N. D. 451, 67 N. W. 821, this court held that "so long as the matter remains executory it [bank] can

fall back upon the defense of *ultra vires*," and that "so long as the business remains unfinished the person dealing with the bank must take the risk of the refusal by the latter to proceed. He is bound to know that the act is *ultra vires*." The respondent seeks to sustain the judgment on the ground that the state alone can object that the contemplated loan was in excess of the amount permitted to be loaned to one person, under the provisions to which we have referred. This is doubtless a correct statement, when applied to many cases, but is not in the case at bar. It has often been held that where the loan is made on a contract which has been fully executed the borrower cannot set up as a defense to an action on the contract the fact that it is *ultra vires*, or entered into in excess of the authority of the corporation, because to permit him to make such a defense in an action brought to recover on the indebtedness would result in his retaining the benefits, and this would be inequitable and unconscionable. Having dealt with the bank and received his consideration in such case, he is estopped from denying the authority of the bank to make the contract. However, many courts hold that the corporation cannot recover on the note or contract, but may maintain an action for money had and received, or other appropriate action. In the instant case, the plaintiff could undoubtedly maintain an action to cancel or recover possession of his notes and mortgages, if the bank had them and was seeking to retain or was claiming any rights under them. As a general rule, contracts to perform acts forbidden by express statute or which subject the parties to punishment, are unenforceable. 1 Page, Contr. §§ 329-333, and authorities cited. This seems to be a quite simple and elementary proposition, and undoubtedly would be so treated, except that courts, evidently in attempts to meet the exigencies of individual cases, have refined away much of the force which common sense would seem to give the law. If it is a crime to do an act, what reason can be advanced for the enforcement of a contract which requires one of the parties to do the thing which constitutes the crime? Would not the enforcement of such contracts by courts be lending the processes of law to promote and encourage disobedience to law? Would it not be employing the machinery intended to sustain and uphold the law to effect its destruction? The law will not lend its support to claims

founded upon its violation. Without entering upon an extended discussion of the subject, it may be said that the intent of the legislature in making the prohibition in question is important, and the law should be so construed as to carry out that intent. For whose protection was it intended? It is known to every person conversant with business life that a large percentage of bank failures, with resulting loss to stockholders and depositors, is caused by loaning too large a proportion of the stock or deposits to single individuals. Experience and observation had shown in a general way about what proportion might be loaned in the aggregate and leave the bank, under ordinary conditions, and circumstances, able to pay depositors as they make demand. They also serve as a guide in fixing the size of individual loans. While no exact margin of safety could be established, the legislature, from a survey of the field of banking and conditions in the state, exercised its judgment and concluded that 15 per cent of the capital stock and surplus was the most that the bank ought to be permitted to loan to anyone. This limitation is for the protection and to promote the safety of the stockholders, depositors and other customers, but especially of depositors and customers. *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531. Recognition of this is probably one of the most potent reasons given by courts for holding that a bank may recover on an executed contract made in violation of the prohibition. They reason that the legislative intent was to protect the depositors, and that to deny recovery when the other party has the bank's money would not only promote injustice, but would defeat the object sought to be accomplished. On the other hand, where to permit a recovery would defeat the end sought to be attained, the contract will not be enforced, and if not enforceable, damages for its breach cannot be recovered. 29 Am. & Eng. Enc. Law, 62; *Pratt v. Short*, 79 N. Y. 437, 446, 35 Am. Rep. 531. In the case at bar the bank positively denies the receipt of anything of value from the plaintiff. If the mortgages and notes ever reached it, the former were never recorded, and the defendant has at no time made any claim thereunder. Appellant claims that the papers were not delivered, and that, therefore, the contract was purely executory. Respondent argues that they were delivered, and that nothing remained to be done but for the appellant

to make redemption, and that, therefore, the contract was fully executed on his part. It is, however, clearly shown by the record that appellant not only did not receive the papers, but that redemption and clearing the title of mortgages required still other acts on the part of respondent, and that the contract was not an executed one, notwithstanding the fact that the jury must have found that the bank received the papers, and this in the face of no evidence of mailing and of no positive evidence that they were received. At most the contract was only partially executed. One of the tests applied in cases of this nature is, Can the plaintiff establish his case otherwise than through the medium of an illegal transaction to which he himself was a party? Elliott, Contr. § 646, and cases cited; Ray, Contractual Limitations, 146; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737. If this is the proper test, it is obvious that plaintiff must show the agreement to loan, and the amount of the loan contemplated. In doing so he discloses the illegality of the act on which his contract rests, and on which he relies for recovery. The burden of proof is at all times on the plaintiff. It would serve no usefull purpose to review *in extenso* the numerous and conflicting authorities bearing on the subject of *ultra vires* and illegal contracts. We find only one authority directly in point, and that, so far as the opinion discloses or we have been able to ascertain from an examination of the statutes of the state in which it is found, rests upon a statute which provides no penalty for a violation of the prohibition, other than the forfeiture of the franchise.

In Swindell v. Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13, the facts were that the bank brought suits against Swindell & Company as principal and other defendants as indorsers on certain promissory notes. The principal defendants pleaded that the cashier of the bank made an agreement that it would from time to time loan them, up to the limit of \$20,000, in such amounts as they might desire, the loans to be evidenced by notes; that the defendants agreed to give the bank all their domestic business, which amounted to a very large sum; that the bank in pursuance of this agreement loaned the defendants between \$16,000 and \$18,000, and refused to lend the balance of the \$20,000 contracted for. The Swindell firm sought to recover dam-

ages for breach of the contract, and the answer set forth the elements claimed to constitute the damages, which were claimed by way of recoupment against the notes. The Georgia statute prohibited that bank loaning money, unless it was amply secured by good collateral, and the answer did not set up that the bank had sufficient capital and surplus to authorize, under the statute, loans on other security, and it was held that the court would take judicial notice of the fact that the capital of the bank was less than the sum necessary to entitle it to loan on other security than collateral. It held that the alleged contract to lend \$20,000 was a positive violation of the express terms of the statute, and that, therefore, this fact constituted a valid defense to Swindell's claim for damages. It was further held that the cashier had no authority to make an agreement to lend \$20,000 of the bank's money, and the court pertinently remarks: "If he had such authority, what limitation was there upon his right to lend all of the bank's assets to one individual? The direction of the bank is in its board of directors, and even if the directors could delegate to a merely ministerial officer, such as a cashier, their legislative and judicial functions, they could not do so unless expressly so authorized, either by the general law or by the charter or by-laws of the bank. . . . Even if such authority was conferred by the charter of the bank upon the directors, it would be void in this case, because in positive violation of the terms of the general laws contained in the Civil Code [1895] § 1916. . . . Of course if the bank had no authority, through its directors, to make such a contract, the cashier could not have such authority. It therefore clearly follows that the bank could not have been held liable in damages for any breach of an agreement which the cashier had made with the defendants without authority from the bank and in direct violation of the banking laws of the state. This would be to give the cashier greater authority than the law gives to its creature, the bank itself." It then held that notice of the power and legal capacity of a corporation, or of the bank, was indisputably imputed to all persons contracting with it, and that Swindell & Company were put on notice that the agreement made by the cashier to loan them \$20,000 was illegal; that the law was for the benefit of the public, as well as for the stockholders, and that the power to ratify an

agreement which the bank had no authority to make could not exist, and that neither the stockholders nor the directors, by acquiescence or express agreement, could ratify any contract made by any officer or by the bank itself, which the law expressly forbade. It then discusses the subject of estoppel on the part of the bank, and the court says that it is aware of no case which goes to the extent of holding that there can be an estoppel where the contract could not lawfully be made by the corporation.

We may observe in this connection that the same court holds that had the loan been consummated in violation of the law, a recovery of the money could be had by the bank. In this Georgia case the defendants had executed the contract to the extent of giving the bank its business, and loans had been made to it to the amount named. We are satisfied that the legislature of this state has announced, in the provision referred to and governing state banks, what it considers a rule of sound public policy, and one necessary to the protection of all persons dealing with a state bank, and that without disregarding the plain intent of that body this judgment cannot be sustained. It is therefore reversed, and the District Court is directed to enter judgment for the defendant.

Petition for Rehearing Filed May 20, 1914.

PER CURIAM. Respondent has submitted a petition for rehearing, which each member of this court has carefully considered. As is usual in petitions for rehearing, attention is called to several incidental points in the evidence which it is asserted the court has overlooked. The bar should bear in mind that this court can seldom in an opinion recite or refer to every fact in the case. To do so would lengthen many opinions to such an extent that they would never be read, would so involve the statement of facts that each reader would have as much difficulty in deciphering them as this court often has. The most we can do is to refer to controlling facts, and sometimes, in addition, such facts as furnish sidelights. It is true that counsel and the court do not always agree as to what facts are controlling, but we attempt to

state sufficient facts or claims to enable the reader to follow intelligently the issues presented.

Respondent says that the opinion appears to be based largely upon the conclusion that the verdict was not sustained by the evidence; that, if there is to be a review of the facts for the purpose of ascertaining whether they sustain the verdict, the abstract should be completed by adding to it material evidence omitted; and that plaintiff has the right to be heard on this question. Respondent had the opportunity to amend the abstract to cover such evidence, if the statement of the case includes it. We did not make reference to the evidence on the general proposition that the verdict was not sustained by the evidence as to a contract. We did, however, refer to the evidence relating to the mailing of the mortgages to appellant as not showing that they were mailed and received, but as in fact showing the contrary.

Great reliance is placed upon the case of *Anderson v. First Nat. Bank*, 5 N. D. 451, 67 N. W. 821, and referred to in the opinion, as being in conflict with the decision in the case at bar. There is a marked distinction between the principles involved in the *Anderson Case* and those in the case at bar. The question of agency was the subject of the controversy in the *Anderson Case*. In the case at bar, the question of agency is involved, but only incidentally, the controlling question being that of making a loan. This loan had to be made by the bank to enable it to execute the agency contract, if there was one, and the loan was in excess of the amount which the law permits such a bank to make. True, there were other payments to be made with the proceeds of the loan contemplated, beside those necessary to effect the redemption from the sale which had been made, but the amount necessary to effect the redemption was \$2,317.94, and without affording the respondent even the temporary use of this money, no provision was made or contemplated for effecting the redemption. In the original briefs, arguments were based almost entirely upon the questions of a loan; but respondent, at least in a measure, shifts his position in his petition for rehearing, and argues that the subject of the action was the making of the redemption as the agent of respondent. It must be clear that this could be of no avail unless means were provided with which to make it. Had the plaintiff furnished the bank with

the means with which to effect the redemption, and had the bank agreed to make it, but failed to do so, the case would be in principle parallel with the Anderson Case. But in the Anderson Case the portion of the opinion which respondent relies upon was purely *obiter*, as the court first decided that the acting of the bank as the agent of Anderson was a legitimate employment; but, even in a subsequent portion of the opinion upon which respondent relies, it is said that "so long as the business remains unfinished, the person dealing with the bank must take the risk of the refusal by the latter to proceed;" and it is further said, "he is bound to know that the act is *ultra vires*." And it is also said in the same case on its first appearance in this court (4 N. D. 182, 59 N. W. 1029), that "if plaintiff (the principal) in giving his instructions to the defendant (the agent) couched his instructions in ambiguous language, the plaintiff cannot hold the defendant responsible for the consequence, if defendant, in the exercise of reasonable prudence, while acting in good faith, put an interpretation upon the instructions not intended by the plaintiff. In such cases the principal and not the agent, must suffer the loss." In the case at bar there is at least grave doubt whether the minds of the parties to the transaction involved ever met on what was to be done by the bank. The testimony of the plaintiff is both conflicting and ambiguous.

Reference is made in the petition to the Swindell Case, which, it is said, differs from the case at bar in that the contract in that case was wholly executory. Even if that differentiated the cases, it is not the fact. One of the controlling considerations in that case for the agreement of the bank to make advances to the plaintiff was that it should have the plaintiff's business, which was of great value, and the plaintiff gave it its business. This was at least a partial execution of the contract on the part of Swindell. The petition for rehearing is denied.

A. P. SIMONSON v. CARL F. WENZEL, Maria Wenzel, and M. C. Krupp, and the Dakota Development Company, a Corporation.

(147 N. W. 804.)

W. who held an unrecorded executory contract for the purchase from D. of certain real property, under which he was in possession, executed and delivered to plaintiff a mortgage thereon, which was recorded. Subsequently W. assigned his interest under such contract to K. for a valuable consideration, who in good faith paid the consideration, including the amount due to D., the vendor, under such executory contract, and procured a deed from such vendor without actual knowledge of the existence of such mortgage. In an action by W. to foreclose his mortgage. *Held:*

Mortgage — equitable interest.

1. That W. had a mortgageable interest in the property.

Conveyance — recording act.

2. That the mortgage of his equitable interest to plaintiff constituted a "conveyance" within the meaning of our recording act.

Mortgage — record of — constructive notice — contract for deed — assignment.

3. That the record of such mortgage operated as constructive notice to K., who, with actual knowledge of W.'s equities, purchased an assignment of his contract for deed.

Equitable interest — recognized and protected.

4. That to the extent of the amount paid by K. to D., with interest, he has an equity superior to plaintiff's claim, which should be recognized and protected by the decree.

Opinion filed June 5, 1914.

Appeal from District Court, McHenry County, *A. G. Burr, J.*

From a judgment in plaintiff's favor, defendant M. C. Krupp appeals.

Affirmed as modified.

Christianson & Weber (Edward Eugerud, of counsel), for appellants.

The term "conveyance" embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged, or encumbered, or affected, except wills and powers of attorney. Rev. Codes 1905, §§ 5038, 5039.

The interest of a vendee under an unperformed executory contract does not constitute real property of such vendee. *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51; *Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712.

Equity will not regard a thing as done which is not done, when it would injure third parties who have sustained detriment and acquired rights by the things that have been done. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779.

This is a mere equitable fiction, and does not in reality create an interest or estate in the land in the vendee. *Chappell v. McKnight*, 108 Ill. 570; *Warvelle, Vend. & P.* p. 187, § 2; *Sutherland v. Parkins*, 75 Ill. 338; *Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104; *Miller v. Shelburn*, 15 N. D. 186, 107 N. W. 51.

Under such a contract the vendor remains the owner of the land to all intents. The relation is personal. *Davis v. Williams*, 130 Ala. 530, 54 L.R.A. 751, 89 Am. St. Rep. 55, 30 So. 488; *Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104; *Bradwell v. Bank of Bainbridge*, 103 Ga. 242, 29 S. E. 756; *Chappel v. McKnight*, 108 Ill. 570.

The words "real property" are coextensive with "lands, tenements, and hereditaments." Rev. Codes, §§ 4736, Subdiv. 2, 4738, 6721.

The practice of recording instruments is purely a statutory creation, and the constructive notice provided for thereby exists only to the extent which the statute declares. The recording of an instrument not required or entitled to be recorded has no effect, either on the instrument or the parties. *Mesick v. Sunderland*, 6 Cal. 297; *Lewis v. Barnhart*, 145 U. S. 56, 36 L. ed. 621, 12 Sup. Ct. Rep. 772; *Burck v. Taylor*, 152 U. S. 634, 38 L. ed. 578, 14 Sup. Ct. Rep. 696; *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688, 16 Sup. Ct. Rep. 523; *Ludlow v. Van Ness*, 8 Bosw. 178; *LeNoir v. Valley River Min. Co.* 113 N. C. 513, 18 S. E. 73; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; Rev. Codes, § 5042; *Payne v. Markle*, 89 Ill. 69.

Any instrument executed by one not having a record title would be out of the chain of title, and not binding on anyone. *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W. 1023; Rev. Codes, § 5042.

A purchaser is not required to look one day or one page beyond that which shows the title of his grantor. *Ford v. Unity Church Soc.* 120

Mo. 498, 23 L.R.A. 561, 41 Am. St. Rep. 711, 25 S. W. 394; Connecticut v. Bradish, 14 Mass. 296; Corbin v. Sullivan, 47 Ind. 356; Odle v. Odle, 73 Mo. 289; Hibbs v. Union Cent. L. Ins. Co. 40 Ohio St. 543; Sands v. Beardsley, 32 W. Va. 594, 9 S. E. 925; Bingham v. Kirkland, 34 N. J. Eq. 229; Farmers' Loan & T. Co. v. Maltby, 8 Paige, 361; Calder v. Chapman, 52 Pa. 359, 91 Am. Dec. 163; Bright v. Buckman, 39 Fed. 243; Donovan v. Twist, 105 App. Div. 171, 93 N. Y. Supp. 990; Losey v. Simpson, 11 N. J. Eq. 246.

The record of a mortgage before the records disclose title in the mortgagor is not constructive notice to a second grantee. 2 Devlin, Deeds, 3d ed., p. 1330, 1331, § 724; Farmers' Loan & T. Co. v. Maltby, 8 Paige, 361; Losey v. Simpson, 11 N. J. Eq. 246; Calder v. Chapman, 52 Pa. 359, 91 Am. Dec. 163; Page v. Waring, 76 N. Y. 463; Buckingham v. Hanna, 2 Ohio St. 551; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; Hetzel v. Barber, 69 N. Y. 1; Schoch v. Bird-sall, 48 Minn. 441, 51 N. W. 382; Turman v. Sanford, 69 Ark. 95, 61 S. W. 167; Sarles v. McGee, 1 N. D. 365, 26 Am. St. Rep. 633, 48 N. W. 231; Union Nat. Bank v. Moline M. & S. Co. 7 N. D. 201, 73 N. W. 527; Rev. Codes N. D. § 5042.

The stipulation contained in the contract against such assignment or hypothecation was a valid, integral part of the contract itself. Mueller v. Northwestern University, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110; Barringer v. Bes Line Constr. Co. 23 Okla. 131, 21 L.R.A. (N.S.) 597, 99 Pac. 775; Zetterlund v. Texas Land & Cattle Co. 55 Neb. 355, 75 N. W. 860.

The holder of a junior equity by acquiring the legal title before he has notice of a prior equity obtains the superior right. Carlisle v. Jumper, 81 Ky. 282; Newton v. McLean, 41 Barb. 285; Rexford v. Rexford, 7 Lans. 6; Carroll v. Johnston, 55 N. C. (2 Jones, Eq.) 120; Hoult v. Donahue, 21 W. Va. 294; Fitzsimmons v. Ogden, 7 Cranch. 2, 23 L. ed. 249; Simmons v. Ogle, 105 U. S. 271, 26 L. ed. 1087.

C. W. Hookway and D. J. O'Connell, for respondent.

Any interest in property, which is capable of being transferred or conveyed, may be mortgaged. Rev. Codes 1905, § 6154.

A mortgage may be created upon property held adversely to the mortgagor. Rev. Codes 1905, § 6158; 27 Cyc. 1139, and cases cited.

In such cases one who attempts to buy the legal title from the owner

is charged with constructive notice. *Alden v. Carver*, 32 Ill. 32; *Crane v. Turner*, 7 Hun, 357; *Balen v. Mercier*, 75 Mich. 42, 42 N. W. 666.

FISK, J. This is an appeal from a judgment of the district court of McHenry county, decreeing the foreclosure of a real-estate mortgage in plaintiff's favor. The appeal is upon the judgment roll proper, appellants' contention being that the conclusions of the trial court are not warranted by the findings of fact.

Such findings of fact are in substance as follows:

1. That on and prior to March 20, 1906, the defendant, Dakota Development Company, was the owner in fee of the real estate in controversy as disclosed by the public records in the office of the register of deeds. On such date this company entered into an executory contract with defendant Carl F. Wenzel, in the usual form, whereby, for a stated consideration of \$100, \$35 of which was paid in cash and the balance to be paid in equal instalments on March 20, 1907, and March 30, 1908, with interest, it promised and agreed to sell and convey such premises to the said Wenzel, such contract obligating the purchaser to pay all taxes and assessments levied, assessed, or imposed upon the premises in each year, and also contained a stipulation that "no assignment or transfer of any interest in and to this agreement or the lands described, less than the whole thereof, will be recognized by said vendor under any circumstances or in any event whatever, and no assignment shall be binding upon the vendor unless approved by its president." It also contained a stipulation "that time is to be the very essence of this agreement." Such contract also contained other stipulations relative to the vendor's right to declare a forfeiture in case the vendee failed in any respect to comply with his part of the contract, but we deem it unnecessary to set such provisions out *in extenso*.

2. Defendant Wenzel entered into the possession of the premises, and constructed a dwelling house thereon, which he and his family occupied as their homestead until about January 20, 1908, when he sold and assigned such contract to defendant M. C. Krupp.

3. On April 17, 1907, Wenzel and wife, for a valuable consideration, executed and delivered to plaintiff their promissory note for the sum

of \$914.70, payable on November 1st thereafter, with interest at the rate of 8 per cent per annum; and to secure the payment thereof they executed and delivered to plaintiff a mortgage on the land in controversy, which was filed in the office of the register of deeds of McHenry county on April 18, 1907, and recorded in book 31 of mortgages, at page 516.

4. That such note and mortgage have not been paid, and plaintiff is the present owner and holder thereof.

5. That Carl F. Wenzel paid to the Dakota Development Company the sum of \$35 at the time of the execution of the contract for deed, but made default in the payment due March 20, 1907, and the same was not paid until after the assignment of such contract to defendant Krupp, as hereinafter set forth. That such contract for deed was at no time recorded or filed for record in the office of the register of deeds of McHenry county, and the record title of the premises at all times up to January 29, 1908, remained in the Dakota Development Company.

6. On or about January 20, 1908, Wenzel, while in possession of said land as his homestead, entered into negotiations with defendant Krupp for the sale to him of the contract for deed aforesaid, and the premises therein described, upon the terms that such contract was to be assigned to Krupp, who was to receive a warranty deed of the premises direct from the Development Company. Wenzel and wife thereupon assigned their interest in such contract to Krupp, and the latter paid to the Development Company the amount then remaining due upon said contract (\$65 and interest), and Krupp also paid to Wenzel the agreed consideration of \$1,000 less the payment aforesaid to the Development Company, and the Development Company did not, nor did its president or any one of its authorized officials, have any knowledge or actual notice of the execution or delivery of the mortgage to the plaintiff aforesaid.

7. That defendant Krupp purchased Wenzel's interest in such contract in good faith, and without any actual notice or knowledge of the existence of plaintiff's mortgage, and he had no intent to cheat or defraud the plaintiff, but acted in absolute good faith in the making of said purchase, and purchased and paid for the same in utter ignorance of the plaintiff's mortgage, but he knew that Wenzel and family

were living on and occupying said premises, but had no notice or knowledge of such mortgage other than that imparted by the record thereof.

8. On January 24, 1908, the Development Company duly executed and delivered to Krupp a warranty deed in the usual form, conveying the premises to him, which deed contained the usual covenants, and which was duly filed for record on January 29, 1908.

9. The trial court also found that the defendant Wenzel was on March 3, 1910, adjudged a bankrupt in the Federal court, and on June 22, 1910, that court, in due form, discharged him from all debts and provable claims, the notes held by plaintiff being scheduled in such bankruptcy court.

Upon such findings of fact the district court made conclusions of law favorable to plaintiff, adjudging a foreclosure of his mortgage.

Among other conclusions, the trial court found that at the time of the execution of the mortgage by Wenzel he had a mortgagable interest in and to the said premises by virtue of the contract for deed, and that the recording of such mortgage was due and legal notice to all the world of the rights of the plaintiff as mortgagee, and that defendant Krupp therefore had constructive notice of such mortgage at the time he purchased the assignment of the contract for deed to the said premises, and the conveyance of the premises to him by the Development Company was subject to the lien of plaintiff's mortgage.

From the above it is apparent that the crucial question for decision is whether appellant Krupp, who, as the trial court found, in good faith and for value purchased an assignment of the Wenzel contract and a deed of the premises from its codefendant, the Development Company, without any actual knowledge of the plaintiff's mortgage, was, nevertheless affected with constructive notice thereof so as to confer upon plaintiff a lien under his mortgage superior and paramount to the rights of such defendant. In answering this question we must bear in mind the fact, as found by the trial court, that the contract for deed executed and delivered by the Development Company to Wenzel was not entitled to record, nor was the same disclosed in any way by the public records, and, as far as such records disclosed, Wenzel had no interest whatever in the property in controversy, but the same stood in the name of and was owned exclusively by the Development Company.

It is no doubt true that Wenzel, by such executory contract of purchase which gave him possession, acquired an equitable interest in such property which he might sell or mortgage (*Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712); and it is likewise no doubt true that his possession under the contract operated to convey notice to the world of his equities thereunder. But Wenzel's interest under such contract was cognizable merely in equity, not in law. *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51; *Cummings v. Duncan*, *supra*. His possession under such executory contract operated, no doubt, as notice to the world of his equities thereunder. It is, however, quite a different proposition to say that such possession constituted notice of the rights of persons claiming to hold as assignees, vendees, or mortgagees of such equitable interest.

Was appellant Krupp, under the facts, charged with constructive notice of plaintiff's mortgage? As stated by appellant's counsel this suggests two main inquiries.

First, was the mortgage a conveyance within the meaning of the recording laws? Second, was it a conveyance in the chain of title?

Plaintiff's right to recover depends upon an affirmative answer to both of these questions. Counsel for appellant assert, with apparent confidence in the correctness of their position, that both of such questions must receive a negative answer, and they have presented a very able and ingenious argument in support of their contention. They apparently concede that under the general statutory rule in other states, either in express terms or by judicial construction, the record of an instrument conveying or encumbering a mere equitable estate or interest, as well as a legal estate or interest, operates to give constructive notice thereof, but they seek to differentiate our recording act from the statutes of other states, and contend for a construction eliminating from its operation mere equitable interests or liens. As suggested by them, it is undoubtedly true that the doctrine of constructive notice by recording instruments is of purely statutory creation, and that the recording of an instrument not within the statute does not impart constructive notice thereof. This, of course, is elementary. 2 Devlin, Deeds, § 646, and cases cited.

The recording acts of this state are embraced in §§ 5038, 5039, and 5042.

Sec. 5038 reads in part as follows: "Every conveyance by deed, mortgage, or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, deed of quitclaim and release, of the form in common use, or otherwise, is first duly recorded."

Sec. 5039 defines the term "conveyance" as used in the last section as embracing "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills and powers of attorney."

Sec. 5042 provides: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof; but knowledge of the record of an instrument out of the chain of title does not constitute such notice."

The first clause of the section last quoted constituted the entire section as originally enacted, but in 1899 the legislature, by chapter 167, Laws of 1899, added thereto the latter clause, which, no doubt, as counsel state, was for the purpose of changing the rule announced by this court in *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W. 1023. In that case it was held that *actual knowledge of the record of an instrument out of the chain of title* was constructive notice of the original instrument and of the rights of the parties under it, and by such amendment the rule was changed so that now mere knowledge of the record of an instrument out of the chain of title does not constitute notice thereof.

Our first inquiry, therefore, is whether plaintiff's mortgage, which covered Wenzel's equitable interest under his executory contract to purchase the real property in question, is such an instrument as was entitled to be recorded. In other words, was such mortgage a "conveyance" within the meaning of the recording laws aforesaid? The able counsel for appellant argue that it was not, their line of reasoning being that the executory contract for the purchase of the property by Wenzel, and under which he took possession of the property, gave him no

estate or *interest* in the property, but merely a chose in action. They criticize and attempt to differentiate the holding of the Michigan court in *Balen v. Mercier*, 75 Mich. 42, 42 N. W. 666, wherein it was held that the vendee under such an executory contract acquired an interest in the land which could be sold, assigned, or mortgaged; and counsel assert that this court in the cases of *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51, and *Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712, expressly held contrary to the Michigan holding in the above case. Counsel are in error in this respect. In *Miller v. Shelburn*, it is true, it was held that *at law* such an executory contract "produces no effect upon the respective estates and titles of the parties, and creates no interest in nor lien or charge upon the land itself. The vendor remains to all intents the owner of the land; he can convey it to a third person free from any legal claim or encumbrance; . . . in short, the vendee obtains at law no real property nor interest in real property." But the court expressly recognized the universal rule that in equity such contracts are regarded as transferring to the vendee in possession an equitable estate or interest which he may sell, assign, or mortgage, as stated by the Michigan court, and in *Cummings v. Duncan*, such equitable rule was also recognized. We there expressly held that the vendee's equitable interest in the real property under such a contract could be levied upon and sold under execution. Surely, if this be true, and there can be no doubt upon this proposition, then such vendee had an estate or interest in the land which he could sell, assign, or mortgage, and such is, as we understand it, the universal holdings of the courts.

In support of the correctness of our views we will content ourselves by citing 27 Cyc. 1037, and cases cited, from which we quote: "The purchaser under an executory contract for the sale of land, or a bond for title, being in possession and having partly performed his part of the contract, although the legal title remains in the vendor, has an interest in the premises which he may mortgage to a third person." The fact that in the technical legal sense no estate or interest in the real property is conveyed to the vendee under such a contract is not controlling. *Wenzel* clearly had a mortgagable interest in the real property under all the authorities. 27 Cyc. 1037 and 1139 and cases cited. *Houghton v. Allen*, 2 Cal. Unrep. 780, 14 Pac. 641; *Jones v.*

Lapham, 15 Kan. 540; Laughlin v. Braley, 25 Kan. 147; Crane v. Turner, 67 N. Y. 437; Smith v. Patton, 12 W. Va. 541; Muehlberger v. Schilling, 19 N. Y. S. R. 1, 3 N. Y. Supp. 705; Scott v. Farnam, 55 Wash. 336, 104 Pac. 639; Heard v. Heard, — Ala. —, 61 So. 343; 1 Jones, Mortg. § 136.

Do our recording laws include such a mortgage? We are entirely satisfied that this question must also receive an affirmative answer. The contention of appellant's counsel to the contrary is, we think, based upon an unwarranted and erroneous construction of our statute. We are unable to distinguish our law from the Michigan law and the corresponding statutes in most states. The fact that the Michigan statute in defining the word "conveyance," as used in its recording law, in addition to the language in § 5039 of our code adds the words "in law or equity," does not make their statute broader than ours. We think the statute would convey the same meaning without these words, and they were evidently inserted through a superabundance of precaution. Furthermore, the language in the first portion of the section, "the term conveyance . . . shall be construed to embrace every instrument . . . by which *any estate or interest* in real property is created, aliened, mortgaged, or assigned," clearly was intended to cover a mortgage of an equitable title. In support of our views see Clark v. Lyster, 84 C. C. A. 27, 155 Fed. 513; 27 Cyc. 1157, and cases cited in note 28 on page 1158; also 1 Jones, Mortg. § 476.

Having reached the conclusion that plaintiff's mortgage was entitled to record under our recording acts aforesaid, it only remains for us to determine whether the record thereof imparted constructive notice to defendant Krupp at the time he purchased an assignment of Wenzel's contract and procured the deed from Wenzel's grantor, the Dakota Development Company. In considering this question it is important to bear in mind the fact that Krupp knew that Wenzel was in possession of the premises, asserting equitable ownership under the contract of purchase, and that he expressly recognized Wenzel's contract rights by purchasing from him an assignment thereof.

In the light of these facts, can Krupp successfully urge that Wenzel's mortgage to plaintiff was out of the chain of title, and hence, under § 5042, Rev. Codes, the record of such mortgage did not constitute notice thereof to him? We think not. The basic fallacy in appellant's

argument, as we now view it, consists in the unwarranted assumption that such mortgage, as to him, was out of the chain of title. The reverse is true. He dealt with Wenzel, and therefore was bound in law to know, and in fact did know, that he was the equitable owner of the premises, and that his equitable title came from the Dakota Development Company through such contract. He was also bound in law to know, therefore, that Wenzel had a mortgagable interest in the premises, and that he might have sold, assigned, or mortgaged such interest, and the conveyance in either form would have been entitled to record. As to Krupp, therefore, the chain of title did not stop with the Development Company, but the last link in such chain was in Wenzel. He was therefore charged with constructive notice of plaintiff's mortgage, and bought subject thereto. It would have been entirely different had he dealt alone with the Development Company in ignorance of Wenzel's rights. In such event § 5042, *supra*, would have afforded him protection, but under the facts it can have no application.

As said in 1 Jones on Mortgages, § 476: "The registry of a conveyance of an equitable title is notice to a subsequent purchaser of the same interest or title from the same grantor. . . . The record of a mortgage or other conveyance which is entitled to be recorded operates as constructive notice to subsequent purchasers claiming under the same grantor, or through one who is the common source of title,"—citing *Edwards v. McKernan*, 55 Mich. 520, 526, 22 N. W. 20. See also *Jones v. Lapham*, 15 Kan. 540, wherein Judge Brewer, while on the supreme bench of Kansas, in speaking to the point, said: "As to Maggie Murray, it appears that she had knowledge of the equitable interest, but not of the mortgage. Hull, however, was in possession of the lots, and had made valuable improvements on them. These improvements she bought. Now, § 20 of the conveyance act (Gen. Stat. 187) provides that 'every such instrument in writing [and this, by prior description, includes mortgages, and mortgages upon equitable interests] shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgages shall be deemed to purchase with notice.' While this general provision, as respects notice, may be limited, so far as relates to conveyances or mortgages of equitable interests, by the condition of the legal title, and the knowledge which

the holders thereof have of the existence of the equity, as indicated in *Kirkwood v. Koester*, 11 Kan. 471, yet, aside from that limitation, it is of controlling force. Whoever buys a legal estate, having knowledge of an outstanding equitable interest, is chargeable with notice of any record of conveyance or encumbrance thereof. Whoever buys an equitable interest in land is also chargeable with like notice. In fact, knowledge of an equitable interest carries with it notice of the condition of such interest as is apparent from the public records." We understand that the rule thus stated by Judge Brewer is generally recognized and well established, and we do not think that such rule is changed in this state by chapter 167, Laws of 1899, heretofore referred to.

We do not think there is any merit in appellant's last contention, to the effect that the contract under which Wenzel occupied the land in express terms prohibited any assignment thereof without the vendor's consent, and that such a stipulation is valid, and a violation thereof confers no rights on the assignee. The vendor, the Dakota Development Company, is not here urging any such question, and certainly Krupp, who dealt with Wenzel in recognition of his equitable interest, cannot be heard to raise such question.

We think it clear that Krupp purchased with constructive notice of plaintiff's mortgage, and that, therefore, the district court did not err in its conclusions and judgment in plaintiff's favor.

We think the judgment appealed from is correct, except in one particular. Such judgment in effect decrees that plaintiff's mortgage covers not only the equities held by the mortgagor, Wenzel, but also the interests purchased by Krupp from the Development Company. Clearly this cannot be true. Wenzel, of course, could hypothecate nothing that he did not own. The interest of the Development Company consisted of the legal title held in trust as security for the payment of the remainder due it on the purchase price. To the extent of such interest the Development Company manifestly had rights superior to those of the mortgagee, and Krupp, by his purchase from such company, succeeded to such rights. Hence, the decree should recognize and protect these rights in some proper manner. It seems to us that a proper method for so doing would be to adjudge that out of the proceeds of the sale defendant Krupp be first paid or reimbursed the amount paid

by him to the Development Company as the balance remaining due on the purchase price, with interest thereon from the date of such payment.

The District Court will modify its judgment accordingly, and as thus modified the judgment is affirmed. No costs shall be taxed to either party on the appeal.

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- stock may be permitted to run at large within districts which may have been designated by the commissioners, and not to the nature and extent of such district. *Saunders v. Dunn County*, 377.
2. The question when stock may run at large under N. D. Laws 1913, chap. 178, may be submitted to the people, either by the commissioners on their own motion, or after they have been petitioned to submit the same by one fourth of the electors in any one of the districts previously determined and designated by such court. *Saunders v. Dunn County*, 377.
 3. The boards of county commissioners have the exclusive power and discretion as to the creation and boundaries of districts in which stock may be allowed to run at large, under N. D. Laws of 1913, chap. 178, providing for the creation of districts in which stock may run at large during certain seasons of the year. *Saunders v. Dunn County*, 377.

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- 1a. An objection to the introduction of letters on the ground that they are incompetent and immaterial does not raise the point that they have been altered since their receipt. *Dallas v. Luster*, 450.
2. An appeal from an order granting a new trial will be deemed to have been waived where the senior counsel for the appellant not only merely intimated to the trial judge before the making of such order that he deemed it

APPEAL AND ERROR—continued.

necessary and would stipulate thereto, but after the making of such order, and on the cause being called for disposition on a new trial, the junior counsel for the appellant, having announced his readiness for trial, asked that the cause might be dropped on the calendar, and set for a certain day, in order that his senior who was absent from the state, might be accommodated, and where the court had no knowledge or information that there was any objection to a new trial until the appeal was taken, which was not done until the day before the trial was to be held. *McDowell v. McDowell*, 577.

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3. There is no strict compliance with N. D. Rev. Codes 1905, § 7333, providing that in case of service by mail the paper must be deposited in the post-office, addressed to the person on whom it is to be served at his place of residence, and the postage paid, as is required of one who seeks by the service of notice of entry of judgment to restrict or limit the time for taking an appeal, where a notice was sent by mail addressed merely to the city attorney of a certain city, not mentioning him by name, especially where it appeared that the city had no city attorney at the time, the attorney of record for the city having resigned and transferred his residence to another city, as proper practice requires that the service of such notice be made upon the attorney of record in the action. *Ross v. Kenmar*, 487.

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4. No statement of the case for the purposes of appeal is necessary to enable a party to raise an error appearing from and based upon the judgment roll. *Savold v. Baldwin*, 342.

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5. Although N. D. Rev. Codes 1905, § 9972, permits a challenge for cause for the existence of a state of mind on the part of a juror which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, it is no abuse of such discretion for the trial court to disallow a challenge for cause, interposed for the reason that a juryman states upon his *voir dire* that the fact that a man was arrested and brought before the jury to be tried might indicate to his mind that there was something in it, where the juror qualifies his statement by saying that, if selected as a juror, he will try the case entirely on the evidence. *State v. Lesh*, 165.
6. It is not an abuse of discretion for a trial court to permit the plaintiff to

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file an amended and substituted complaint changing the character of the plaintiff from individuals to a partnership, where the members of the partnership and the original plaintiffs are the same persons, and without giving written notice of such amendment to the defendant, if he is present in court by himself or counsel and has an opportunity to object and except to such amendment, and where, upon the allowance of such amendment, no suggestion is made to the presiding judge that the defendant has a counterclaim against the partnership which he did not have against the partners as individuals, or that his defense is otherwise materially prejudiced. *Kain v. Garnaas*, 292.

7. An order made by a trial court, in the exercise of its discretion, refusing to relieve a party from the default in preparing and serving his proposed statement of the case, is a final order affecting a substantial right, and is appealable. *Rabinowitz v. Crabtree*, 353.

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8. Delay for nearly one year after the perfection of an appeal in causing a settlement of a statement of the case and in the transmission of the record by the appellant, and further delay in filing abstracts and briefs until after the commencement of the second term of the court following the filing of the record, none of which delays are attempted to be excused, show such laches in prosecuting the appeal as to require its dismissal. *Oksendahl v. Hales*, 381.

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9. A defendant in an action for criminal conversation will not be heard to urge in the supreme court any grounds for reversal not relating to the question of damages, where he admitted upon the witness stand that he repeatedly had illicit relations with plaintiff's wife, as alleged in the complaint, and his counsel in his argument to the jury in effect told them that the sole question for their determination was that of the amount of damages which would be awarded to the plaintiff. *Vollmer v. Stregge*, 579.

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10. In an action to foreclose a second mortgage, in which the mortgagor sets up the defense that he has executed a deed of the mortgaged property to the plaintiff under an agreement whereby the plaintiff assumed all the encumbrances against the land, a finding by the trial court that the plaintiff had in fact agreed to assume all such encumbrances will not be sustained,

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where it is not only unsupported by the preponderance of the evidence, but is contrary to the great preponderance thereof, and inconsistent with and contrary to every reasonable probability that can be drawn from the testimony. *First Nat. Bank v. Arntson*, 242.

HARMLESS ERROR.

11. Error in refusing to sustain a challenge for cause does not justify the reversal of a judgment, where the jurymen was excused and the party challenging did not exhaust all of his peremptory challenges. *State v. Lesh*, 165.
12. It is not reversible error for a plaintiff in proving his case, to introduce in evidence a judgment which acts as an estoppel to the defense of the defendant, as, if such judgment is conclusive as an estoppel, the defendant is not injured because the proof of such judgment is not reserved for rebutting testimony. *Kain v. Garnaas*, 292.
13. Error cannot be successfully predicated upon rulings refusing to give requested instructions, where the charge as given substantially and accurately covers the matter embraced in the instructions thus requested. *Vollmer v. Stregge*, 579.
14. An instruction in an action for criminal conversation, not relating to damages, although prejudicial when standing alone, is nonprejudicial where the charge as a whole is fair, and especially where the sole issue submitted to the jury is that of the extent of the plaintiff's damages. *Vollmer v. Stregge*, 579.
15. A statement made by the court in an action for damages for criminal conversation, before the jury was impaneled, which was not addressed to the jury, to the effect that the record should show that one of the attorneys for the defendant represented him in a criminal action growing out of the same transaction, and merely made in connection with his ruling forcing defendant to trial, is not prejudicial nor improper. *Vollmer v. Stregge*, 579.
16. Any error in the refusal, in an action for damages for criminal conversation, to give an instruction relative to mitigation of damages, is nonprejudicial where the court in its charge in effect took from the consideration of the jury as not proven the facts chiefly alleged as tending to enhance plaintiff's damages, and, by so doing, left no occasion or necessity for a charge as to mitigating facts and circumstances. *Vollmer v. Stregge*, 579.

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3. A general deposit of money in a bank is not a bailment to said bank, but a giving of credit merely. *Shuman v. Citizens' State Bank*, 599.
4. The right of a bank to offset, as against a general deposit, a past-due debt owing to the bank by a depositor, is not founded upon the theory of a lien, but upon the right of offset and application of payments. *Shuman v. Citizens' State Bank*, 599.
5. A bank has the right to apply to the payment of a demand note held by it a general deposit of the maker, although part of the money in such deposit is held by the maker as trustee, a fact of which the bank has no notice or knowledge, actual or constructive, until after the application. *Shuman v. Citizens' State Bank*, 599.
6. A statute giving a banker a general lien, dependent upon possession, upon all property in his hands belonging to a customer, for any balance due him from such customer in the course of business, does not apply to a general deposit so as to prevent the application by the banker of a general deposit consisting in part of money held in trust by the depositor, a fact of which the bank had no notice, to a demand note due it from the depositor, on the theory that the statute expressly limits the lien of the banker to property belonging to the customer, while in such a case the money or deposit belongs to the *cestui que trust*. *Shuman v. Citizens' State Bank*, 599.
7. A deposit of money in a bank to the credit of the general account of the depositor raises an implied consent that the bank may apply the same, or so much thereof as may be needed, to the payment of a demand note held by it against the depositor. *Shuman v. Citizens' State Bank*, 599.

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2. It is no defense to an action by the holder of a note held as collateral, that the holder failed to enforce or to attempt to enforce collection of the principal note before bringing suit **upon the collateral**. *Farmers' Bank v. Riedlinger*, 318.

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3. The fact that the holder of a negotiable promissory note in due course notified the maker thereof that it was in his hands for collection, rather than as collateral, is immaterial, especially where it appears that the words "for collection" were inadvertently used. *Farmers' Bank v. Riedlinger*, 318.
4. The negotiable instrument act does not change the rule that a demand note, even though drawing interest, is due at the time of its delivery, and as between the original makers needs no presentment or demand. *Shuman v. Citizens' State Bank*, 599.
5. As against the maker of a demand note which draws interest and is made payable at no particular place, no demand is necessary to mature such note, as it is due at once and upon delivery. *Shuman v. Citizens' State Bank*, 599.

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2. A broker is entitled to his commission after correspondence with his principal resulting in bringing a purchaser to the principal, although, before the trade is completed, he becomes connected with a corporation and turns the remainder of the negotiations over to the corporation, where the principal makes no objections when notified of the fact, and carries on the remainder of the correspondence and dealings with the corporation the same as though the original party still continued as a party to their transactions. *Northern Immigration Asso. v. Alger*, 467.
3. Proof that a broker had land listed for sale, that he listed it with another broker as his agent, that the agent introduced a prospective customer to the principal, and that the principal, instead of consummating the sale himself, introduced the attorney in fact for the owner of the tract to the prospective customer, and permitted him to consummate it, is sufficient to sustain the verdict of a jury awarding commission for bringing the owner and purchaser together, resulting in the sale of the land. *Northern Immigration Asso. v. Alger*, 467.

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2. A railroad company is liable as a warehouseman where goods are received and unloaded and the freight thereon paid by the consignee, but part only is actually and physically delivered, because the consignee has insufficient drayage facilities to remove all, unless at the time of such partial delivery it gives notice to the consignee that it will not insist upon storage charges and will no longer hold possession of the property as a warehouseman. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.

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2. The state bonding act, N. D. Laws 1913, chap. 194, is invalid as an unwarranted delegation of judicial power to the commissioner of insurance and the auditing board, purely administrative officers, as it commits to the commissioner the sole right to determine the amount due subdivisions whose officials are insured, by reason of any default or violation of official duties, and also delegates to the auditing board the power to determine when bonds of insured officials shall be canceled, which are judicial functions. *State ex rel. Miller v. Taylor*, 77.

POLICE POWER.

3. A statute requiring lard, unless sold in bulk, to be put up in pails or other containers holding 1, 3, or 5 pounds net weight, or some whole multiple of these numbers, and not any fraction thereof, is not such an arbitrary and unreasonable law as cannot be justified under the police power of the state, although the state previously had a law requiring the net weight of articles sold in containers to be stamped on the container. *State v. Armour & Co.* 177

EQUAL PROTECTION.

Uniformity in taxation, see Taxes, 4, 5.

CONSTITUTIONAL LAW—continued.

4. A statute which regulates the manner of selling every article of food and beverage, and which requires lard, lard compound, or lard substitutes unless sold in bulk, to be put up in pails or other containers holding a certain number of pounds net weight, is not void as class legislation. *State v. Armour & Co.* 177.
5. A law requiring lard, unless sold in bulk, to be put up in containers holding a certain number of pounds net weight, is a reasonable exercise of the police power, and does not unconstitutionally interfere with the guaranty of the right of freedom of contract and of the equal protection of the laws. *State v. Armour & Co.* 177.

DUE PROCESS OF LAW.

6. A statute requiring lard, unless sold in bulk, to be put up in containers holding a certain number of pounds net weight, is not unconstitutional on the theory that it is a taking of property without due process of law. *State v. Armour & Co.* 177.
7. The state bonding act, N. D. Laws of 1913, chap. 194, is invalid as providing for the taking of the property of counties, cities, and other subdivisions of the state without due process of law, as it attempts to authorize the commissioner of insurance to determine the amount due to any such subdivision whose official it is claimed has defaulted or has been guilty of malfeasance in office, without notice to such subdivision or any opportunity for a hearing, or any other provision for determining, by means of any channel for the administration of justice, any question of liability which may arise between the subdivision and the bonding department, and as it attempts to constitute the insurance commissioner the judge and the jury as well as the custodian of the fund, and to impart to him the power to serve in these conflicting capacities. *State ex rel. Miller v. Taylor*, 77.
8. The due process of law provided for in N. D. Rev. Codes 1905, § 9646, relative to the removal of public officers by accusation, recognizes only those rules of procedure which are fundamental in their nature and essential to the administration of justice. *State v. Borstad*, 533.

CONSTRUCTION.

Of ordinance for public improvements, see Public Improvements, 3.

CONTEMPT.

Appealability of order in proceedings for, see Appeal and Error, 1.

1. City officials who disobey an injunction enjoining them from proceeding with

CONTEMPT—continued.

the annexation of territory contiguous to a city, and from proceeding with the levy of the city tax upon such territory, are guilty of a civil contempt, although they act in perfect good faith, believing that an appeal in the annexation proceedings had superseded the provisions of the injunction, and that they are conserving the interests of the city, and that no harm can come to the plaintiff by reason of their acts. *Red River Valley Brick Corp. v. Grand Forks*, 431.

2. The question of punishment for civil contempt lies in the sound discretion of the trial court, and if the court desires to extend leniency, the fine may be a mere nominal one, but must be in addition to the costs and expenses of the proceeding, including statutory attorney's fees, taxable by the clerk of court the same as in any other civil action. *Red River Valley Brick Corp. v. Grand Forks*, 431.

CONTEST.

Jurisdiction of election contest, see *Courts*.

Between rival candidates for office of mayor, city council's jurisdiction over, see *Municipal Corporations*, 7.

CONTRACTS.

Cancellation of, in equity for fraud, see *Equity*.

Parol evidence to vary terms of written contract, see *Evidence*, 5.

Injunction against breach of, see *Injunction*, 1-6.

Ratification by landlord of tenant's unauthorized contract for drilling well, see *Mechanics' Liens*.

For public improvements, see *Public Improvements*, 1.

IMPLIED CONTRACT.

Implied consent by depositor that bank may apply deposit to payment of demand note, see *Banks*, 7.

To pay for services performed, see *Evidence*, 3.

1. No implied agreement to return advance payments made by an automobile dealer to a distributing company upon the signing of an agency agreement in which a certain number of cars were ordered arises upon the failure of the dealer to sell any cars and his consequent failure to take any of the cars ordered. *Gile v. Interstate Motor Car Co.* 108.

CONTRACTS—continued.

LACK OF MUTUALITY.

Injunction against breach of, see Injunction, 3.

See also post, 5.

2. The specific performance of a contract wanting in mutuality of obligation may be enforced in equity, as mutuality of contract standing alone may be insufficient to render a contract otherwise equitable, nonenforceable and invalid in equity, a different rule being recognized in equity from that in actions at law as to want of mutuality. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
3. A contract entered into by a telephone company with a railroad company for the installation, maintenance, and service of a telephone in the railway station as long as the telephone company maintains a telephone exchange in the town, the consideration to the telephone company being merely the permission to install the telephone in the station and incidental benefits accruing to the telephone company and its patrons therefrom, the contract being terminable by the railroad company at its option on thirty days' written notice, but with no corresponding right of cancellation reserved to the telephone company, and expressly stipulating against cancellation by the telephone company, is inequitable because of want of mutuality, inadequacy of consideration, and length of term, so that a court of equity will not enforce specific performance of it, but treat the same as invalid and nonenforceable. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
4. Whether an agreement between an automobile dealer and a distributing company, whereby the dealer is given the exclusive right to sell automobiles in a number of counties upon his order for a number of cars and an advance payment on each car, lacks mutuality, and is therefore voidable and unenforceable, while wholly executory, is not controlling, where the parties have acted under it during the entire period of its existence, but under such circumstances it cannot be questioned, and must to such extent control and measure the rights of such respective parties. *Gile v. Interstate Motor Car Co.* 108.

CONSIDERATION.

When agreement with agent lacks consideration authorizing recovery back of advance payments made, see Money Received.

5. A five-year contract entered into by a telephone company with a railroad company for the installation, maintenance, and service of a telephone in

CONTRACTS—continued.

the railroad station, the consideration for such installation, maintenance, and service by the telephone company being the permission to install for the public convenience and that of the railroad company, granted by the railroad company to the telephone company, the contract being nonterminable by either party during the term thereof, but thereafter by either party, upon giving thirty days' notice, is mutual, and based upon a sufficient consideration, so as to render it equitable and enforceable in equity. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 258.

LEGALITY OF OBJECT.

6. Contracts to perform acts which are forbidden by statute, or which subject the parties to punishment, are as a general rule, unenforceable. *Wald v. Wheelon*, 624.
7. One of the tests to be applied in determining whether an action for damages can be maintained for the breach of a contract calling for the performance of criminal acts is whether the plaintiff can establish his case otherwise than through the medium of the illegal transaction to which he himself was a party. *Wald v. Wheelon*, 624.
8. A customer of a bank cannot recover damages against it for breach of an executory contract to make a loan in excess of the amount permitted by law to be loaned to one person, where such act, if perfected, would result in the subjection of the officers of the bank to liability to conviction and fine, and the bank to a forfeiture of its franchise. *Wald v. Wheelon*, 624.

CONTRIBUTORY NEGLIGENCE. See *Negligence*, 3.

CONVERSION.

Right of set-off in action for, see *Set-Off and Counterclaim*, 1.
See also *Trover*.

CORPORATIONS.

Vacation of judgment by default against foreign corporation, see *Judgment*, 4, 5.
Municipal corporations, see *Municipal Corporations*.

COSTS.

As part of punishment for civil contempt, see *Contempt*, 2.

COSTS—continued.

On appeal in proceeding to condemn land for courthouse, see Costs, 6.

Fees of county commissioners for services; see Officers, 6-9.

1. Costs to either party will be denied, and no costs or disbursements will be taxed, but each party will be required to pay his own costs and disbursements, where neither party prevails as to all contentions made, but each recovers equal relief. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
2. A mortgagee is not entitled to an allowance of attorneys' fees under N. D. Rev. Codes 1905, § 7176, in an action by the mortgagor to have a deed declared a mortgage, and for an accounting, where it was admitted in the answer that the deed was a mortgage, but its foreclosure was at no time asked for. *McCurdy v. Boring*, 1.

ON APPEAL.

3. An allowance of \$1 a page for printing abstracts and briefs, as disbursements to the prevailing party, upon appeal, should be reduced to 50 cents per page, where the adverse parties' sworn statement that the actual disbursements for such printing were 50 cents a page is not rebutted or explained. *Styles v. Dickey*, 328.
4. The court rules governing printing of abstracts and briefs require that the printed page shall be 7 inches long by 3½ inches wide of printed matter, exclusive of page numbering. *Styles v. Dickey*, 328.
5. A party waives any deficiency in the size of a printed abstract and brief used on appeal, by failing to direct the attention of the court to the deficiency, on such appeal, and to ask for a reduction, and the amount actually paid for the printing should be taxed as costs in favor of the prevailing party on the appeal. *Styles v. Dickey*, 328.
6. Where a party whose land is being condemned for a courthouse site recovers a judgment of dismissal in the trial court, and the county prevails upon an appeal therefrom, he is entitled under the state Constitution § 14, requiring full compensation to be first paid the owner before the taking of private property for public use by condemnation, to the costs of the appeal, as well as the costs of the trial below, as all such costs are but a necessary part of the ascertainment of the amount of damages to be paid for the property taken. *Mountrail County v. Wilson*, 277.

COUNTERCLAIM. See Set-Off and Counterclaim.

COUNTIES.

- Costs on appeal in proceedings to condemn land for courthouse, see Costs, 6.
- In sale of land by county for less amount than it paid at tax sale, see Fraud.
- Public buildings, acquiring site for, by eminent domain, see Eminent Domain.
- Judicial notice that new county has not built courthouse, see Evidence, 1.
- Compensation of county commissioners, see Officers, 6-9.
- Removal of county commissioners by accusation, see Officers, 6, 7.

PUBLIC BUILDINGS.

1. A county may acquire by gift any number of grounds as sites for county buildings, whether used for such purposes or not, and the acceptance of title to one site does not bar it from accepting title to another site donated to the county, even though both are inadequate for the purpose. *Mountrail County v. Wilson*, 277.
2. A county is not the purchaser of any site for a courthouse, but is the possessor of two inadequate sites, both donated, where two half-acre tracks are deeded to the county by two different individuals, one for the nominal consideration of \$1, and the other as an absolute gift, the donor also agreeing to pay the expense of acquiring additional grounds, and both gifts are accepted, the county commissioners having decided that one-half acre is not sufficient ground for a courthouse site. *Mountrail County v. Wilson*, 277.
3. A county which accepts a gift of a courthouse site from a private citizen, but does not, by its proper officers, adjudge such site to be adequate, proper, or suitable for courthouse purposes, is not estopped by any condition contained in the deed donating the site, from the free right of choice of a site, as a private citizen cannot acquire a private interest as against the public in the matter of the location of public buildings. *Mountrail County v. Wilson*, 277.
4. No question of change of location from one established site to another is involved where a county has never had a courthouse or a courthouse site, and a site which is donated to it and accepted has never been legally chosen and designated as a courthouse site by the board of county commissioners, upon whom the duty of selecting a site is devolved by law. *Mountrail County v. Wilson*, 277.
5. The provision of N. D. Rev. Codes, 1905, § 2399, authorizing the purchase

COUNTIES—continued.

of new county grounds in lieu of those already had, and providing that the old tract should not be sold until authorization is first obtained by a majority vote of the people of the county, does not apply where a county had no courthouse or courthouse site and acquires two sites by gift, and the one acquired last is selected and designated as the site by the board of county commissioners in preference to the other, as no question of the sale of county land is involved. *Mountrail County v. Wilson*, 277.

COUNTY BUILDINGS. See *Counties*; *Eminent Domain*.

COUNTY COMMISSIONERS.

Compensation of, see *Officers*, 6-9.

COURTHOUSE.

Costs on appeal in proceeding to condemn land for, see *Costs*, 6.

Acquiring site for, see *Counties*; *Eminent Domain*.

Judicial notice that new county has not built court house, see *Evidence*, 1.

COURTS.

Right to review legislative action in annexing territory to city, see *Municipal Corporations*, 5, 6.

The district court has jurisdiction to hear and determine a contest over the election of the mayor of a city, under N. D. Rev. Codes 1905, § 688, prescribing a method for contesting elections for county offices, and giving the district courts jurisdiction, and N. D. Rev. Codes of 1905, § 2746, providing that the manner of the conducting of and voting at city elections, and contesting the same, of keeping of poll lists and of canvassing the votes, shall be the same, as nearly as may be, as in the case of election of county officers under the General Laws. *Nelson v. Gass*, 357.

CRIMINAL CONVERSATION.

Estoppel to allege error on appeal in action for, see *Appeal and Error*, 9.

Reversible error in instruction in action for, see *Appeal and Error*, 14-16.

Proof of marriage by contracting parties in action for criminal conversation, see *Witnesses*.

CRIMINAL CONVERSATION—continued.

FORMER JEOPARDY.

1. The offense of keeping intoxicating liquor for sale as a beverage is a continuing offense, so that a conviction or acquittal under an information charging the commission of such offense at various and sundry times between certain dates will be a bar to a subsequent prosecution for the keeping of liquor for sale as a beverage between such dates. *State v. Lesh*, 165.

PRELIMINARY EXAMINATION.

2. The mere fact that a state's attorney has conducted a preliminary state's attorney's examination does not make it necessary for him, on the commencement of a prosecution in the county court for a violation of the liquor laws by the filing of an information merely, to file the depositions and the testimony taken at such preliminary examination. *State v. Lesh*, 165.
3. A state's attorney may commence a prosecution in the county court for a violation of the liquor laws, by the filing of a properly verified information only, and without a preliminary state's attorney's examination. *State v. Lesh*, 165.

CRIMINAL LAW.

Proof of charges against officer beyond reasonable doubt in action for removal, see Evidence, 13.

Privilege against self-crimination in proceedings for removal of officer by accusation, see Officers, 4.

Instructions in criminal prosecutions, see Trial, 9, 10.

CRIMINATION OF SELF.

Privilege against, in proceedings for removal of officer by accusation, see Officers, 3.

CROPS.

When division of grain takes place permitting chattel mortgage to attach on tenant's share of crops, see Chattel Mortgage, 1.

Estoppel to assert that mortgage on tenant's share of crop never attached for lack of division, see Estoppel.

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CROSSING.

Contributory negligence at railroad crossing, see Railroads.

CUSTOM.

As to effect of use of gross weight pails on constitutionality of statute requiring sale by net weight, see Weights and Measures, 3.

DAMAGES.

Measure of damages for breach of contract to furnish telephone service, see Injunction, 6.

LIQUIDATED DAMAGES.

Sufficiency of answer in action to recover from agent, advance payment which it was agreed agent to keep as liquidated damages, see Pleading, 3.

1. An attorney holding a power of attorney to foreclose a real estate mortgage cannot, where he is attempting to recover on the notes and to foreclose the mortgage, recover also on a contract a sum as liquidated damages for the failure of the mortgagor to pay notes out of the crops from year to year. *Hocksprung v. Young*, 322.
2. An advance payment made by an automobile dealer to a distributing company upon the signing of an agency agreement in which a certain number of automobiles were ordered, which it is stipulated in the agreement may be retained by the distributing company as liquidated damages upon the failure of the dealer to take and pay for the cars ordered, cannot be recovered by the dealer upon his failure to take the cars ordered, on the theory that the same is a penalty, especially where the proof shows that the actual damages suffered by the distributing company on account of the dealer's failure to perform exceeded the amount of the deposit. *Gile v. Interstate Motor Car Co.* 108.

DECEDENT'S ESTATES.

Dismissal of action on claim against administrator not brought within three months after rejection, see Dismissal.

Tax on, see Statutes, 2; Taxes.

DEFAULT.

- In serving proposed statement of case, see Appeal and Error, 7.
- Opening judgment by, see Judgment, 4, 5.
- In payment of interest or instalment on mortgage, right to foreclose, see Mortgage, 6, 7.

DEFENSE.

- To action by holder of note held as collateral, see Bills and Notes, 2.

DEFINITION.

- Conveyance, see Mortgage, 3.
- Gross negligence, see Negligence, 1.

DELAY.

- As ground for dismissing appeal, see Appeal and Error, 8.

DELEGATION OF POWER. See Constitutional Law, 1, 2.**DEMAND.**

- Necessity of, for payment of demand note, see Bills and Notes, 4, 5.
- As prerequisite to action for conversion, see Trover.

DEMAND NOTE.

- Bank's right to apply maker's deposit to payment of, see Banks, 5-7.
- Necessity for presentment on demand, see Bills and Notes, 4, 5.

DEMURRER.

- In proceedings for removal of officer by accusation, see Officers, 3.

DEPOSIT.

- In bank, see Banks, 2-7.

DESCRIPTION.

- In ordinance creating assessment district, see Municipal Corporations, 17.

DISCRETION.

Review of, see Appeal and Error, 5-7.

DISMISSAL.

Of appeal, see Appeal and Error, 8.

The complaint in an action against an administrator upon a claim against a decedent's estate may be dismissed upon motion therefor based upon the summons, complaint, and proof of service, where such papers affirmatively and conclusively show that the action was brought more than three months after the presentation and rejection of the claim by the administrator. *Mann v. Redmon*, 346.

DISSOLUTION.

Personal judgment against acting partner in action for dissolution of partnership, see Judgment, 1.

DIVORCE.

Appearance as waiver of lack of service in action for, see Appearance.

An action by a widow to vacate a decree of divorce, based upon the absence of legal service upon the defendant, is maintainable even after the death of her husband, where the same is instituted for the purpose of establishing the fact that she is the widow of the deceased and entitled to maintain proceedings to contest his will on the ground of fraud and undue influence, and to recover her just share of his estate. *Dallas v. Luster*, 450.

DOMICIL.

Residence of voters, see Elections.

Right of married alien supporting family domiciled in foreign country to claim homestead, see Homestead.

DUE PROCESS OF LAW. See Constitutional Law, 6-8.

DUPLICITY.

In information, see Indictment and Information, 4.

ELECTIONS.

- On question of animals running at large, see *Animals*, 1, 2.
Jurisdiction of election contest, see *Courts*.
Sufficiency of evidence of nonviolation of corrupt practice act, see *Evidence*, 10.

RESIDENCE OF VOTER.

1. The place of one's residence for the purpose of voting is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return, and it must be determined from all the facts and circumstances, and the intention must be accompanied by acts in harmony therewith. *Nelson v. Gass*, 357.
2. A laborer had his residence in a town for the purposes of voting at an election, where he worked for a man whose headquarters were in the town, but who employed men to work in different places in the country, and, when in the town, he stayed at his employer's place until sent out on a job, and, after completing one job, and before commencing another, he always returned to his employer's place and slept there and made it his home. *Nelson v. Gass*, 357.
3. The residence of a farm laborer who has no family, and who works from place to place, for the purpose of voting, will be deemed to be in the city in which he voted, where he had voted in the city for many years claiming it to be his residence, had a room and furniture including a stove, bed, and table in the Salvation Army Hall, where he went when out of work, and considered it as his home, and, when working out of town for a period of greater or less length of time, frequently went to town and occupied his room, to which he had a key, although the year before he had been sick and stayed at his son's residence in the city, giving no explanation of how he happened to make affidavit that he resided at his son's house, and when first approached at the polls informing the election officers that he had not resided in the town during the five months preceding the election. *Nelson v. Gass*, 357.
4. A farm laborer who was a single man had his residence for the purposes of voting only where he was employed, although he claimed a town as his residence and went to the home of a person to whom he was not related when out of employment, paying for room and board, and on holidays or other convenient occasions, went into town for business or pleasure, but left no trunk or belongings of importance at the place, and retained no room there while absent and, although he claimed that he had not voted at a general election nearly three years before in the township from which he came, the contrary was proved by the poll book. *Nelson v. Gass*, 357.

ELECTIONS—continued.

5. The good faith intent of a voter to make a definite place his home for all purposes is one essential element entering into the determination of the question of his residence for the purpose of qualifying him to vote, and a domicile once gained does not continue until a new one is acquired for voting purposes, nor does the right to vote in a particular precinct continue until the right to vote elsewhere is shown, but the shortest absence coincident with an intention to change the residence defeats the right to vote at the former domicile. *Nelson v. Gass*, 357.
6. A single man who was a farm laborer had his residence for the purposes of voting where he worked, and did not acquire a residence in a precinct where he had not lived for ninety days next preceding the election, although he claimed his employer's house in the city and in the precinct in which he voted as his residence for two years prior to election, where, during the preceding summer, he worked in the country and had his effects with him, and in the fall went to work on a farm adjoining the city, belonging to the man whose house in the city he claimed as his residence, and kept his trunk on the farm and slept there, but took his meals in the city, and less than ninety days before election, went to work in another place in the country, where he worked until ten days before the election, when he went into town for three days and stayed at a hotel in a different precinct from the one in which he voted, and then resumed work on the farm of his former employer adjoining the city. *Nelson v. Gass*, 357.

EMINENT DOMAIN.

Costs on appeal in proceedings to condemn land for courthouse,
see Costs, 6.

1. A county may, under N. D. Rev. Codes 1905, § 2406, acquire by condemnation proceedings additional grounds adjacent to an inadequate site, to constitute an adequate and suitable site for county buildings, without authorization by a vote of the electorate of the county. *Mountrail County v. Wilson*, 277.
2. The necessity of the taking of additional land for a courthouse site is established where the board of county commissioners has determined that additional land for such purposes is necessary. *Mountrail County v. Wilson*, 277.

EQUAL PROTECTION. See Constitutional Law, 4, 5.

EQUITY.

Action to foreclose chattel mortgage as suit in, see Chattel Mortgage, 2.

Specific performance of contract in, see Contracts, 2, 3, 5.

Right to jury trial in, see Jury.

Question for jury in action of, see Trial, 2.

The power to cancel a contract will not be exercised by a court of equity except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear. *Schinzer v. Wyman*, 489.

ESTOPPEL.

To allege error on appeal, see Appeal and Error, 9.

By accepting gift of courthouse site, see Counties, 3.

To object to special assessment for public improvements, see Public Improvements, 8-10.

Of person acting as state's attorney for county in selling land purchased by county at tax sale to subsequently assert title thereto, see Trusts.

A statement to the mortgagee of the tenant's half of the crops under a lease reserving the title to the crops, until division, in the landlord, by the latter that he instructed the agent of the elevator to which the grain was hauled, to sell every other load for him, and leave the others for the tenant, does not estop the elevator company which bought the grain from asserting, in an action against it by the mortgagee for conversion, that there was no division of the grain, and that therefore the mortgage never attached thereto, as such statement is not binding upon the elevator company, and does not show any division of the grain. *Herrmann v. Minnesota Elevator Co.* 235.

EVIDENCE.

JUDICIAL NOTICE.

1. The supreme court will take judicial notice of the fact that a new county created as a result of a county division has not built any courthouse, but has been occupying temporary quarters. *Mountrail County v. Wilson*, 277.

EVIDENCE—continued.

PRESUMPTIONS AND BURDEN OF PROOF.

Necessity for instruction that failure of accused to take witness stand raises no presumption of guilt against him, see Trial, 10.

As to juror's knowledge of provisions in criminal statute, see Trial, 9.

2. A cause being shown which might produce an accident, and it further appearing that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about the results. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
3. Where a debtor leaves his horses with a creditor to whom he is not nearly related or otherwise under a family or social obligation, and instructs the creditor to sell them as best he can, authorizing him to take bankable paper in his own name, but subject to an accounting, a presumption arises of an agreement to pay compensation for such services. *McCurdy v. Boring*. 1.
4. One having a claim against an estate must prove the presentation and rejection thereof by the administrator and the commencement of suit within ninety days from such rejection, as a part of the proof of his cause of action, although the administrator has answered, pleading the statute of nonclaim. *Mann v. Redmon*, 346.

PAROL EVIDENCE.

5. Parol evidence of a conversation at the time of entering into a written contract is inadmissible to vary the terms of the contract. *Gile v. Interstate Motor Car Co.* 108.

WEIGHT AND SUFFICIENCY.

Sufficiency of proof of attorney's authority under power of attorney, to foreclose mortgage, see Mortgage, 5.

6. A verdict for the plaintiff cannot be sustained where the evidence as to the cause of an accident is so uncertain as to leave it equally clear and probable that the injuries resulted from any one of a number of causes that might be suggested, as in such a case a verdict for the plaintiff would be pure speculation. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
7. The holder of a promissory note establishes prima facie that he acquired title thereto in due course of business, by the mere production of the

EVIDENCE—continued.

- note in court duly indorsed, where the indorsement is not put in issue by the answer, and, in the absence of any contrary showing, no further evidence is necessary to show that he was an innocent purchaser before maturity. *Farmers' Bank v. Riedlinger*, 318.
8. The evidence in an action brought by a well contractor against a landlord to foreclose a mechanics' lien for the drilling of a new well on his premises is insufficient to establish an express contract with the landlord, or with the tenant as his authorized agent, where the contractor was sent to the landlord by the tenant, and the contractor's testimony that they came to an agreement for the drilling of a well at a specified price was contradicted by the landlord and by another who was with him, both of whom testified in effect that the landlord stated that he had made arrangements with the tenant about fixing the old well, and that nothing was said about the price for digging a well, and the testimony of two employees of the tenant was that the landlord told the tenant to go ahead and put the well down, and that the contractor stated to the tenant that he heard that he wanted to put a well down and told him the price he would charge, to which the tenant said that it was all right with him to have the well dug. *Price v. Burke*, 65.
 9. The evidence in an action against the owner of premises by a well contractor for the foreclosure of a mechanics' lien for services rendered in digging a new well is insufficient to establish that the owner had knowledge that the well was being dug under an unauthorized contract with the tenant, so as to be liable for the improvement under N. D. Rev. Codes, § 6237, because of an implied consent, where, before any work was done, the landlord had told the contractor that he had made arrangements with the tenant about fixing the old well, and he testified that he was not upon the place and knew nothing about the work being done until it was completed, and the testimony for the contractor to the effect that the landlord was on the premises during the progress of the works was contradictory, inconsistent, containing matters of self-interest, and given four years after the completion of the work, the contractor himself contradicting the statement that the landlord was on the ground during the progress of the work. *Price v. Burke*, 65.
 10. A finding that a candidate for office did not violate the corrupt practices act, (Laws 1911, chap. 129), § 16, making it unlawful for any person on the day of an election to ask, solicit, or in any manner try to induce or persuade any voter on such election day to vote or refrain from voting for any candidate or ticket or any political party or organization or any measure is sustainable where an elector's vote was challenged and he went to the place of business of a candidate and told him that he had to swear in his vote and requested him "to sign it up for him," whereupon

EVIDENCE—continued.

the candidate went to the polling place and signed the statutory affidavit required to enable one whose vote is challenged to vote, and the evidence was conflicting as to whether the candidate gave instructions to the voter before he voted. *Nelson v. Gass*, 357.

11. A finding that a purchaser of real estate was not guilty of contributory negligence in taking a deed and paying for property, title to which was supposed to be in his grantor, as indicated by a purportedly genuine deed, duly acknowledged and certified, in his possession, is sustainable where the grantor, who had recently come to the city and had opened up real estate offices, was introduced to the grantee, a man without legal education or experience, by reputable business men, and he was informed by his attorney, who examined the records, and the forged deed, that the title was all right. *Peterson v. Mahon*, 92.
12. A finding of fraud or undue influence in obtaining the signature to two warranty deeds, a contract for a deed, and a certain receipt relating to such transactions, is not established in an action by the purchaser of land to set aside such instruments, where it appears that the purchaser was a German widow who had acquired considerable wealth as a result of judicious management, but possessed only ordinary intelligence, and was of a confident disposition; that she had been persuaded by the seller, with whom she had had business dealings, and in whom she had confidence, to visit him at his home in another state; that he induced her to purchase a farm from him; that she signed deeds to two farms to him in exchange, and executed a contract of sale and signed her name as agreeing to a receipt by the seller for the two warranty deeds for the two farms exchanged in his office, relying upon his statements as to the value of the farm held by him; that the farm sold was worth nearly as much as the contract price, and that she made no objections as to the contract until she reached her home and had been persuaded by her friends that she had not been wise in making the deal; and that although she claimed that she was sick at the time of the execution and acknowledgment of the instruments, she was able to take an automobile ride on the same day and to go to her home in another state on the following day. *Schinzler v. Wyman*, 489.
13. It is not necessary in proceedings under N. D. Rev. Codes 1905, § 9646, for the removal of public officers for charging illegal fees, to prove the fact of charging beyond a reasonable doubt, in order to justify a removal. *State v. Borstadt*, 533.

EXCESSIVE LOANS.

Agreement of bank to make, see *Banks*, 1, 2; *Contracts*, 8.

EXECUTION.

Rights of purchaser at sale of mortgaged premises under, as against purchaser on subsequent foreclosure, see Mortgage, 8, 9.

EXECUTORS AND ADMINISTRATORS.

Necessity of proving that suit on claim was commenced within ninety days from rejection, see Evidence, 4.

Dismissal of action on claim against administrator, see Dismissal.

EXEMPTION.

From service of process, see Process, 2.

FEES.

Of county commissioner, see Officers, 6-9.

FINE.

For civil contempt, see Contempt, 2.

FIRES.

Carrier's liability for injury by, see Carriers.

Question for jury as to whether fire was due to negligence of carrier, see Trial, 3, 4.

FOOD.

State regulation of interstate sales of food, see Commerce.

Constitutionality of statute regulating sale of lard, see Constitutional Law, 3-6; Weights.

FORCIBLE ENTRY AND DETAINER.

Sufficiency of complaint and summons in action of, see Pleading, 1.

FORECLOSURE.

Of chattel mortgage, see Chattel Mortgage, 2.

Of mortgage on land, see Mortgage, 5-10.

FOREIGN CORPORATION.

Opening judgment by default against, see Judgment, 4, 5.

FORMER JEOPARDY. See Criminal Law, 1.

FRAUD AND DECEIT.

Sufficiency of evidence of, see Evidence, 12.

Power of equity to cancel contract for, see Equity.

Amending complaint in action to vacate decree quieting title so as to allege fraud of defendant, see Pleading, 6.

Amending complaint in action to vacate decree quieting title in defendant so as to show latter's fraud as officer of state, see Pleading, 6.

Setting aside stipulation for, see Stipulations.

Gross fraud upon the part of a county in the sale of land purchased by it at tax sales, at a price less than the taxes held against the land, is not established where it appears that the county was in urgent need of money, that the county commissioners had advertised the land for sale, and had written letters to various land companies in an effort to obtain a bid for the same, that the title to the land was questionable, and that the purchaser had previously purchased land in the same county from a railroad company with a perfect title at a price 25 per cent less than that paid to the county, and that most of such land was still unsold. *Patterson Land Co. v. Lynn*, 391.

GIFT.

Of site for county buildings, see Counties, 1-3.

GROSS NEGLIGENCE.

Of carrier, see Carriers, 1.

What constitutes, see Negligence, 1.

Of attorney in taking acknowledgment as proximate cause of injury to purchaser from grantee, see Proximate Cause.

GROUND FOR REVERSAL. See Appeal and Error, 11-16.

HALF-BREED SCRIP. See Indians.

HARMLESS ERROR. See Appeal and Error, 11-16.

HOMESTEAD.

A married alien with a family, which he is supporting, at all times resident in a foreign country, cannot claim a right of homestead under N. D. Rev. Codes 1905, § 5049, providing that the homestead of every head of a family residing in the state shall be exempt from forced sale as provided by law, where, although he intends to bring his family to the country, he has not done so for six years since his arrival and four years since he made final proof and executed a mortgage, as residence within the state and upon the homestead is required not only of the head of the family but also of the family itself, within a reasonable length of time after the arrival of the husband in the state and the attempted acquisition of the homestead. *Tromsdahl v. Beaton*, 441.

HUSBAND AND WIFE.

Estoppel to allege error on appeal in action for criminal conversation, see Appeal and Error, 9.

Reversible error in instructions in action for criminal conversation, see Appeal and Error, 14-16.

Divorce, see Divorce.

Competency of witnesses in action for criminal conversation, see Witnesses.

ILLEGAL CONTRACTS. See Contracts, 6-8.

IMPLIED CONTRACTS.

By bank depositor that bank may apply deposit to payment of demand note, see Banks, 7.

To pay for services performed, see Evidence, 3.

See also Contracts, 1.

INDIANS.

LANDS OF.

1. A Sioux half-breed Indian possessing scrip for land issued under the acts of Congress, July 17, 1854, 10 Stat. at L. p. 304, chap. 83, who executes a power of attorney authorizing the holder thereof to sell the land when such scrip is located, and for a designated consideration exonerating him from accounting to the scribee for the purchase price, is entitled, upon

INDIANS—continued.

- location of the scrip and the making of necessary preliminary proof by the holder of such power, to the equitable title to the land, and, upon the subsequent issue of the patent by the United States government, to the absolute ownership thereof. *Heerman v. Rolfe*, 45.
2. A power of attorney executed by the holder of scrip for land obtained under the acts of Congress, July 17, 1854, 10 Stat. at L. p. 304, chap. 83, authorizing the holder thereof to locate the land and also to sell the land when such scrip is located, and, for a designated consideration exonerating him from accounting to the scribee for the purchase price, does not amount to an illegal assignment of the scrip in contravention of such act, as the act merely prohibits the assignment of the scrip as such, and in no manner attempts, to restrict the power of the scribee to alienate the land by contract, deed, or otherwise, either prior or subsequent to the location of such scrip. *Heerman v. Rolfe*, 45.
 3. Where the holder of a power of attorney to locate scrip for land issued under act of Congress, July 17, 1854, 10 Stat. at L. p. 304, chap. 83, and to sell the land, locates the scrip and makes the necessary preliminary proof, and patents are issued to the holder of the scrip, and the land is sold under the power of attorney and possession is taken, improvements made, and taxes paid for a number of years by the ultimate purchaser, such purchaser is entitled to the property as against a purchaser from the holder of the scrip after issuance of the patent, who merely occupied the premises through an agent for two or three years prior to his taking possession, and built a shack thereon, and who had constructive, if not actual, notice of such purchaser's and his grantor's rights. *Heerman v. Rolfe*, 45.

INDICTMENT AND INFORMATION.

Commencing prosecution for violation of liquor law by information, without preliminary examination, see Criminal Law, 3.

1. An information charging the illegal keeping of intoxicating liquors for sale at various and sundry times between certain dates is not defective in that it fails to specify the date on which the crime was committed. *State v. Lesh*, 165.

ACCOMPANYING AFFIDAVIT.

2. An affidavit that a certain person kept intoxicating liquors for sale as a beverage at various times between specified dates states facts, and not mere legal conclusions. *State v. Lesh*, 165.
3. An information verified by the state's attorney in conformity to the statute is sufficient, which has attached to it an affidavit in the form of a criminal

INDICTMENT AND INFORMATION—continued.

complaint, sworn to positively, wherein facts are stated showing the commission by the accused of the crime charged, although the affidavit is not entitled in any court, there being no controversy as to its genuineness. *State v. Lesh*, 165.

DUPLICITY.

4. An information charging the keeping of intoxicating liquors for sale at various and sundry times between specified dates, contrary to law, is not duplicitous in that it includes a number of distinct offenses of the same nature. *State v. Lesh*, 165.

INJUNCTION.

Disobedience of, as a contempt, see Contempt, 1.

Against collection of assessment for public improvement, see Public Improvements, 8, 15, 16.

CONTRACTS.

1. A contract made by a public service corporation with a patron or consumer, whereby it is to furnish service, will be enforced in equity by enjoining it from discontinuing its service or removing its property from the premises of the patron or consumer. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
2. Enjoining the breach of negative covenants is not, strictly speaking, specific performance of the contract, but merely the granting of equitable relief, awarded on the general equities of the case. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
3. While a court of equity will not decree specific performance of a nonmutual contract by compelling performance of it according to its terms, it will indirectly effect the same result, where possible, by merely restraining a breach of its negative covenants, as by enjoining a telephone company from discontinuing service and removal of its telephone from a railway station, where a contract had been entered into for a specific term. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
4. N. D. Rev. Codes 1905, § 6614, providing that an obligation to render personal service or to employ another in personal service cannot be specifically enforced, is not involved in an action by a railroad company to enjoin a telephone company from the removal of telephones from its depots, in express violation of a covenant in the contract not to remove telephones

INJUNCTION—continued.

- during the life of the contract. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
5. A telephone company may be enjoined from removing instruments and discontinuing service pending the determination of its right to charge a consumer for such service. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.
6. The invasion or deprivation of the right of a railroad company to enjoy with the general public the use of a telephone and connections, which right would be violated by the breach of an agreement to furnish service without cost for a definite period, and not to remove the telephone from its premises during such period, is not measurable by the mere rental price of the telephone instrument, and equity will not permit such right to be denied the railroad company while granted to all others in the vicinity, and, as an action at law is inadequate to afford relief for violation of such right, equity will enjoin its violation. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.

PUBLIC OFFICERS.

7. Injunction, and not quo warranto or certiorari, is the appropriate remedy or proceeding to prevent duly elected city officers whose title to office is not questioned, from going beyond their jurisdiction in carrying into effect an invalid attempt at annexation of territory adjacent to the city, when brought by a party having a special interest therein. *Red River Valley Brick Co. v. Grand Forks*, 8.
8. The fact that a special school district has unlawfully incurred an indebtedness exceeding the constitutional debt limit is not a ground for perpetually enjoining the officers of such special school district from annexing certain adjacent territory to such district for school purposes, under N. D. Laws 1911, chap. 266, § 133. *School Dist. v. Thompson*, 459.

INSTRUCTION.

Reversible error in giving or refusing, see *Appeal and Error*, 13-16.
See *Trial*, 9-11.

INSURANCE.

Unlawful delegation of power to state bonding department, see *Constitutional Law*, 1, 2, 7.

INTENT.

- Construing statute so as to give effect to legislative intent, see Banks, 2.
- Of voter to change residence, see Elections, 1, 5.
- Of testator, see Wills, 1.

INTOXICATING LIQUORS.

- Acquittal of accused as bar to subsequent prosecution, see Criminal Law, 1, 2, 3.
- Preliminary examination for violation of liquor law, see Criminal Law, 2, 3.
- Indictment for illegal keeping of, for sale, see Indictment and Information.
- Necessity of alleging date of crime in information for keeping intoxicating liquors for sale, see Indictment and Information, 1.

INVALID CONTRACTS. See Contracts, 6-8.

JUDGMENT.

PERSONAL JUDGMENT.

1. A personal judgment may be rendered against the two acting members of a partnership, based upon an inventory of a certain date, and require such parties to assume the debts of the partnership, where such partners wrongfully exclude a third from participation in the business of the concern, and an inventory and an accounting were had at such time, and about three years afterward the excluded partner brings an action for a dissolution of the partnership, and for a recovery based upon such inventory, for an accounting since such inventory and up to the time of trial, and for general equitable relief, and the defendant partners fail to furnish an accounting, or to produce the books of the partnership in evidence. *Oustad v. Hahn*, 334.

OPENING OR VACATING.

- Action to vacate decree of divorce after death of husband, see Divorce.
- Opening default, see post, 4, 5.

2. The court, in an action on a building bond against the contractor and surety for breach by the contractor of a building contract, may vacate a judgment 27 N. D.—44.

JUDGMENT—continued.

entered upon the sustaining of a demurrer to the complaint, and grant leave to serve and file an amended complaint, where the bond and building contract set forth in the complaint, together with the breach of contract therein treated, may constitute a basis for an action to reform the bond, and, after reformation, permit a recovery of damages for its breach. *Taylor State Bank v. Baumgartner*, 606.

3. A remote purchaser of land purchased at a tax sale by a county, which failed to give notice of redemption to the original owners, as a result of which its grantees secured only a lien on the land, may maintain an action to vacate and set aside a decree quieting the title to the land in one who purchased the title of the original owners, but who was estopped to assert title because of his having been the attorney for the county at the time the land was sold by such county. *Patterson Land Co. v. Lynn*, 391.

OPENING DEFAULT.

4. An order of a trial court setting aside a judgment by default against a foreign corporation in favor of a resident of the state, in the exercise of its discretion, will be affirmed on appeal, under N. D. Rev. Codes 1905, § 6884, authorizing the court to relieve a party from a judgment order or other proceedings taken against him through his mistake, inadvertence, or excusable neglect, where the answer discloses a good defense upon the merits, and the surprise to the party consists of a mistaken belief of his attorney as to the time he had to file an answer. *Murtha v. Big Bend Land Co.* 384.
5. A showing as to a meritorious defense is established, warranting the trial court, in the exercise of its discretion, to relieve a foreign corporation, defendant in an action by attorneys for services rendered and advances made, from a default occurring through inadvertent surprise or excusable neglect, where an officer of the defendant made affidavit that defendant had a full and complete defense upon the merits, and that defendant had never employed the plaintiff, and was not indebted to him, and that he had been advised by his counsel that he had a full and complete defense on the merits, and two attorneys for the defendant made affidavits that the defendant had a meritorious defense to the action. *Murtha v. Big Bend Land Co.* 384.

CONCLUSIVENESS OF ADJUDICATION.

Right to prove former adjudication of issues raised by answer without pleading in reply, see Pleading, 5.

6. A judgment in an action against a mortgagor to recover the possession of

JUDGMENT—continued.

personal property for the purpose of foreclosing a chattel mortgage, for the dismissal of the action, based upon a directed verdict, is *res judicata* as to the question of ownership in a subsequent suit brought by the mortgagor against such alleged owner for the unlawful conversion of the property covered by the mortgage in such prior proceedings, where the mortgagor in the prior action put in issue the ownership of notes secured by such mortgage, and such issue was determined in his favor. *Kain v. Garnaas*, 292.

7. An order refusing to vacate an order which granted a new trial upon the ground of inability, owing to the loss of reporter's notes of the testimony, to settle a statement of the case so as to enable a party to obtain a trial *de novo* in the supreme court, is *res judicata*, and no other district judge has power to review it, even on direct attack. *Missouri Slope Land & Invest. Co. v. Hasteed*, 591.

JUDICIAL NOTICE. See Evidence, 1.

JUDICIAL POWER.

Delegation of, see Constitutional Law, 2.

JUDICIAL SALES.

Rights of purchaser of mortgaged premises at, as against purchaser at subsequent foreclosure of mortgage, see Mortgage, 8, 9.

JURISDICTION.

Of district court, see Courts.

JURY.

Reversible error in refusing to sustain challenge for cause, see Appeal and Error, 11.

Review of discretion and disallowing challenge for cause, see Appeal and Error, 5.

Taking case from, see Trial, 2-8.

RIGHT TO TRIAL BY JURY.

In action to foreclose chattel mortgage, see Chattel Mortgage, 2.

JURY—continued.

1. In the absence of express constitutional or statutory provision, there is no right to a jury trial in suits in equity. *Gresens v. Martin*, 231.
2. It is the rule under N. D. Rev. Codes 1905, § 7009, providing that an issue of law must be tried by the court or by the judge, that a party has no right to a jury trial in suits in equity. *Gresens v. Martin*, 231.
3. An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial is waived, as provided in N. D. Rev. Codes 1905, § 7038, or a reference is ordered, as provided in §§ 7046 and 7047; and every other issue is triable by the court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury or by a referee, as provided in §§ 7046 and 7047. *Gresens v. Martin*, 231.

LACHES.

As ground for dismissing appeal, see Appeal, 8.

Of landlord in bringing action for accounting against tenant on shares, see Landlord and Tenant.

LANDLORD AND TENANT.

Consent of landlord to tenant's contracting for drilling of well on premises, see Evidence, 8, 9; Mechanics' Liens.

Ratification by landlord of tenant's unauthorized contract for drilling well, see Mechanics' Liens.

Right of purchaser of mortgaged premises at execution sale to rent, as against purchaser on subsequent foreclosure, see Mortgage, 8, 9.

RENTING ON SHARES.

When division of grain takes place permitting chattel mortgage to attach on tenant's share of crops, see Chattel Mortgage, 1.

Estoppel to assert that mortgage on tenant's share of crop never attached for lack of division, see Estoppel.

Instruction as to tenant's holding over instead of holding under new lease, see Trial, 11.

The laches of a landlord in delaying for six years to bring an action for an accounting against a tenant of his farm is not sufficient to preclude a recovery where the delay is excused partly because of age and infirmities,

LANDLORD AND TENANT—continued.

and partly on account of poverty, although the tenant in the meantime has lost or destroyed his books of account, and the elevator books showing receipt of grain have likewise been lost or destroyed, and his witnesses have moved away from the vicinity, and he has been unable to locate them. *Hughes v. Magoris*, 479.

LARD.

What constitutes sale of, in original package, see *Commerce*, 2.
Constitutionality of statute regulating sale of lard, see *Constitutional Law*, 3-6; *Weights*.

LEASE.

Purchase money mortgagor's right to recover in foreclosure suit for mortgagee's nonassignment of school leases, see *Set-Off and Counterclaim*, 2, 3.

LEGISLATIVE INTENT.

Construing statute so as to give effect to, see *Banks*, 2.

LEGISLATURE.

Right of court to review action of, in annexing territory to city, see *Municipal Corporations*, 5, 6.

LIENS.

Of bank on deposit, see *Banks*, 6.

LIMITATION OF ACTIONS.

Dismissal of action on claim against administrator not brought within three months after rejection, see *Dismissal*.

Necessity of proving that suit on claim was commenced ninety days from rejection, see *Evidence*, 4.

Laches of landlord in bringing action for accounting against tenant on shares, see *Landlord and Tenant*.

LIQUIDATED DAMAGES. See Damages.

Sufficiency of answer in action to recover from agent, advance payment which it was agreed agent to keep as liquidated damages, see *Pleading*, 3.

LIVE STOCK. See **Animals.**

LOAN.

Limit of individual loans by bank, see **Banks**, 1, 2.

Bank's liability for breach of contract to make excessive loan, see **Contracts**, 8.

LOCAL IMPROVEMENTS. See **Public Improvements.**

MAIL.

Service by, of notice of entry of judgment limiting time to appeal, see **Appeal and Error**, 3.

MARRIAGE.

Proof of marriage by contracting parties in action for criminal conversation, see **Witnesses.**

MATURITY.

Of demand note, see **Bills and Notes**, 4, 5.

MAYOR.

Jurisdiction of contest over election of, see **Courts.**

Jurisdiction of city council over contest for office of, see **Municipal Corporations**, 7.

Mode of determining right to office of mayor in case of tie vote, see **Parliamentary Law.**

MECHANICS' LIENS.

Cross complaint by defendant in action to foreclose, see **Pleading**, 4.

AGREEMENT OR CONSENT OF OWNER.

Sufficiency of evidence of, see **Evidence**, 8, 9.

Proof that a landlord learned for the first time that a well was being dug upon his land by a contractor under an unauthorized contract with the tenant when he visited the land shortly after the completion of the work and while the drilling apparatus was on the land, and that he subsequently

MECHANICS' LIENS—continued.

offered to compromise the claim if the well was satisfactory, does not amount to a ratification of such contract, where the well was in fact unsatisfactory. *Price v. Burke*, 65.

MONEY RECEIVED.

Recovery back from agent of advance payments made, see *Contracts*, 1.

Right to recover back from agent amount stipulated for retention as liquidated damages, see *Damages*, 2.

An agreement between an automobile dealer and a distributing company, whereby the dealer is given the exclusive right to sell automobiles in a number of counties upon his order for a number of cars and an advance payment on each car, which was to be retained by the distributing company in any event, does not fail for lack of consideration, so as to entitle the dealer to recover the advance payment, where the parties have treated the contract as valid during the entire life thereof, but the dealer has been unable to sell any of the cars, consequently none were ordered, and none furnished or tendered him by the distributing company. *Gile v. Interstate Motor Car Co.* 108.

MORTGAGES.

Assignment of certificate of sale under power, see *Assignment*.

Chattel mortgage, see *Chattel Mortgage*.

Mortgagee's right to attorneys' fees in mortgagor's action to have deed declared a mortgage, see *Costs*, 2.

What constitutes, within meaning of recording act, see *Mortgage*, 3.

Purchase-money mortgagor's right to recover in foreclosure suit for mortgagee's nonassignment of school leases, see *Set-Off and Counterclaim*, 2, 3.

PROPERTY SUBJECT OF MORTGAGE.

1. The purchaser under an unrecorded executory contract for the sale of land, being in possession and having partly performed his part of the contract by making a payment thereon, has an equitable interest in the premises which he may mortgage to a third person, although the legal title remains in the vendor. *Simonson v. Wenzel*, 638.

MORTGAGES—continued.

RECORDING.

2. The record of a mortgage of an equitable interest by one in possession of real property under an unrecorded executory contract, who has partially performed his contract by a payment thereon, operates as constructive notice to another person who, with actual knowledge of the mortgagor's equities, purchases an assignment of his contract for deed. *Simonson v. Wenzel*, 638.
3. A mortgage of the equitable interest of a purchaser under an unrecorded executory contract for the purchase of real property, who has gone into possession and partially performed his contract by making a payment thereon, constitutes a conveyance within the meaning of the recording act, N. D. Rev. Codes 1905, §§ 5038, 5039, 5042. *Simonson v. Wenzel*, 638.

PRIORITIES.

4. One who in good faith purchases an assignment of an unrecorded executory contract for the purchase of real property, of which the holder of the equitable interest therein is in possession, having partially performed his contract by a payment thereon, subsequent to the execution and recording of a mortgage of such equitable interest, and who pays up the contract in full, has an equity superior to the mortgagee's claim, to the extent of the amount paid to the holder of the legal title and interest. *Simonson v. Wenzel*, 638.

FORECLOSURE GENERALLY.

Review of findings on appeal in foreclosure suit, see Appeal and Error, 10.

Recovery of designated amount of liquidated damages in foreclosure suit, see Damages, 1.

Sufficiency of complaint in action by attorney under power of attorney, see Pleading, 2.

5. The fact that in an action by an attorney to foreclose a real estate mortgage, the mortgagee himself is present in court and testifies fully in support of a foreclosure action, is conclusive proof that the attorney was authorized to maintain and conduct the proceedings, and that all the requirements of N. D. Rev. Codes 1905, § 7455, were met, where the possession of such power of attorney is alleged in the complaint and the defense is a general denial. *Hocksprung v. Young*, 322.

MORTGAGES—continued.**RIGHT TO FORECLOSE ON DEFAULT IN PAYMENT.**

6. The commencement of foreclosure proceedings for the collection of the full amount secured by a real estate mortgage is a sufficient exercise by the mortgagee of his election to declare the entire sum due on account of the default in the payment of the first instalment, where the mortgage does not provide for personal notice of mortgagee's election to declare the entire sum due. *Doolittle v. Nurnberg*, 521.
7. The acceptance of a draft for interest by a real estate mortgagee does not operate as a waiver of his rights to foreclose the mortgage for the amount of the entire principal where default occurs in the payment of interest and instalments of the principal, and the mortgage contains the stipulation that if default be made in the payment of any sum or the interest when due, it shall be lawful for the mortgagee to foreclose, and also a further stipulation that in case of default in the payment of interest or any instalment of the principal, the mortgagee may declare the whole sum due. *Doolittle v. Nurnberg*, 521.

RIGHTS OF PURCHASER.

8. The holder of a first mortgage, holding an unrecorded assignment of the rents upon premises, is, as against the purchaser at an execution sale, entitled upon the subsequent sale of the premises under foreclosure of his mortgage, to the rent thereafter accruing, where no redemption is made. *F. A. Patrick & Co. v. Knapp*, 100.
9. The purchaser of premises at an execution sale is entitled to the rent and profits from such date until the sale under foreclosure of a prior mortgage, where there is no redemption and he has no knowledge of a prior unrecorded assignment of the rents to the holder of the prior mortgage. *F. A. Patrick & Co. v. Knapp*, 100.

MOTIONS.

Conclusiveness of order refusing to vacate order granting new trial, see *Judgment*, 7.

MULTIPLICITY OF SUITS.

Bringing action on warehouseman's bond for benefit of all persons injured in order to prevent, see *Warehousemen*.

MUNICIPAL CORPORATIONS.

Jurisdiction of contest over election of mayor, see Courts.

Mode of determining right to office of mayor in case of tie, see Parliamentary Law.

Local improvements by, see Public Improvements.

ANNEXATION.

Disobedience of injunction against proceeding with, as a contempt, see Contempt, 1.

Proper remedy to prevent officers from illegally annexing adjacent territory, see Injunction, 7.

1. N. D. Rev. Codes 1905, §§ 2825, 2826, as amended by the Laws of 1909, chap. 58, providing for the annexation of adjacent territory to an incorporated city, must be strictly construed, as, if valid, it grants cities extraordinary power by permitting the annexation of territory in direct opposition to the wishes and protest of the people whose interests are to be affected, and as this power is granted only upon a condition precedent, that the statute shall be complied with. *Red River Valley Brick Co. v. Grand Forks*, 8.
2. Where a city council pursuant to the provisions of N. D. Rev. Codes. §§ 2825, 2826, as amended by the Laws of 1909, chap. 58, passes a resolution describing and annexing certain territory to the city, and after notice duly given, property owners file protests against annexation, whereupon the original resolution is amended so as to include materially less territory, and the territory thus described in the amended resolution is declared to be annexed to the city, the failure to publish or post any notice of the amendment or of the proposed annexation of the lesser territory renders the annexation proceedings invalid. *Red River Valley Brick Co. v. Grand Forks*, 8.
3. A school district and a township have sufficient interest in annexation proceedings wherein it is sought to change a part of the territory of the school district into the adjacent city district, and a part of the township territory into the adjacent city, so as to qualify them to maintain an action to test the validity of such proceedings, where the taxable real estate in such township and district would be greatly lessened and the rate of taxation materially increased. *Red River Valley Brick Co. v. Grand Forks*, 8.
4. A delay of less than five months in instituting proceedings to test the validity of an attempted annexation of adjacent territory does not con-

MUNICIPAL CORPORATIONS—continued.

stitute such laches as to estop the objecting property owners from asserting that their property had not been legally incorporated within the city limits, where the city prepared and filed a map, enacted an ordinance including the annexed territory in certain election precincts, and called an election, but the suit was commenced before the election. *Red River Valley Brick Co. v. Grand Forks*, 8.

JUDICIAL SUPERVISION.

5. The question as to the methods and desirability of extending the corporate limits of a city is a legislative or political question. *Red River Valley Brick Co. v. Grand Forks*, 8.
6. Whether the city council of an incorporated city has complied with the law relative to the annexation of adjacent territory, whether the statute under which it acts is constitutional, what the effect of any irregularities or omissions in pursuing the method prescribed by the statute may be, what are the corporate limits already established, whether what is claimed to be a corporation is a corporation, and whether the legislative authority has been exceeded by the city in its attempt to extend its boundaries, and similar questions, are judicial questions. *Red River Valley Brick Co. v. Grand Forks*, 8.

DETERMINATION OF QUALIFICATIONS OF MEMBERS OF CITY COUNCIL.

7. A city council has no jurisdiction under N. D. Rev. Codes 1905, § 2665, providing that the city council shall be the judge of the election and qualification of its own members, to determine a contest between two rival candidates for the office of mayor, as the mayor is not a member of the council, except in a very limited sense, having only the right to preside and cast the deciding vote in case of a tie. *Nelson v. Gass*, 357.

ORDINANCES.

Ordinance creating assessment district, see *Municipal Corporations*, 17-19.

For public improvement, see *Public Improvements*, 2.

8. An ordinance is valid under a statute or charter requiring ordinances to be passed by a yeas and nays vote, where it is adopted with amendments by a yeas and nays vote, although such amendments may have been adopted by a *viva voce* vote merely. *Robertson Lumber Co. v. Grand Forks*, 556.

MUTUALITY.

Lack of, in contract, see *Contracts*, 2-5.

Injunction against breach of nonmutual contract, see *Injunction*, 3.

NECESSITY.

Of taking additional land for courthouse site, see *Eminent Domain*, 2.

NEGLIGENCE.

Of carrier, see *Carriers*.

Right to nonsuit in action for injury by, see *Trial*, 5-7.

Of attorney in taking acknowledgment as proximate cause of injury to purchaser from grantee, see *Proximate Cause*.

1. Gross negligence is, to all intents and purposes, no care at all, indicating the omission of the care which even the most inattentive and thoughtless seldom fail to take of their own concerns, a reckless temperament, a lack of care which is practically wilful in its nature, and an omission of duty which is akin to fraud. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
2. A plaintiff is not bound to exclude the possibility that an accident might have happened in some other way than that which he contends it happened, as he is required only to satisfy the jury by a fair preponderance of the evidence that the injury occurred in the manner contended. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.

CONTRIBUTORY NEGLIGENCE.

Sufficiency of evidence of purchaser's freedom from contributory negligence in taking deed from one having no title, see *Evidence*, 11.

At railroad crossing, see *Railroads*.

3. In order to constitute contributory negligence as a matter of law, the facts and circumstances must be such that no other inference can fairly and reasonably be drawn therefrom. *Haugo v. Great Northern R. Co.* 268.

NEGOTIABLE PAPER. See *Bills and Notes*.

NET WEIGHT.

Constitutionality of statute requiring sale of lard by, see *Constitutional Law*, 3-6; *Weights*.

NEW TRIAL.

Waiver of appeal from order granting, see Appeal and Error, 2.

Conclusiveness of order refusing to vacate order granting, see Judgment, 7.

PROCEEDINGS TO PROCURE.

1. An order granting a new trial, even though irregularly and erroneously made, cannot be reviewed or held for naught by another district judge of another judicial district where the action was pending, especially upon a mere collateral attack. *Missouri Slope Land & Invest. Co. v. Hasteed*, 591.
2. The objection of a plaintiff to the trial of a case in a different judicial district created by law so as to include the county in which the trial was originally held and judgment rendered, on the ground that such action was no longer pending, the cause of action having been merged in a judgment, and that more than one year had elapsed since the date of service of the notice of entry thereof, and that the order vacating such judgment and granting a new trial was void for lack of jurisdiction in the court granting it, is a mere collateral attack upon an order of the judge of the old district denying the motion by plaintiff for vacation of the judgment and granting a new trial, where the judge of the new district made an order transferring such cause to the judge of the old district, on the ground that he was unable to satisfactorily settle a statement of the case for purposes of appeal on account of the loss of the court reporter's minutes of the testimony, and thereafter an order was made attempting to vacate the order transferring such case, and subsequently the judge of the new district on an *ex parte* application made an order vacating the judgment and granting a new trial because of inability to settle a statement of the case, and afterward made an order refusing to vacate the order which granted the new trial, and the case was thereafter brought on for trial in the newly created district. *Missouri Slope Land & Invest. Co. v. Hasteed*, 591.

NONCLAIM.

Dismissal of action on claim against administrator not brought within three months after rejection, see Dismissal.

Necessity of proving that suit on claim was commenced ninety days from rejection, see Evidence, 4.

NONRESIDENT.

Privilege of, from service of process, see Process, 2.

NONSUIT. See Trial, 5-7.

NOTARY.

Direction of verdict in action against notary for negligence in taking acknowledgment, see Trial, 8.

Gross negligence of, in taking acknowledgment as proximate cause of injury to purchaser from grantee, see Proximate Cause.

NOTES. See Bills and Notes.

NOTICE.

To customer of state bank of limitation on amount of loan to one person, see Banks, 1.

Record of mortgage of equitable interest of purchaser as notice, see Mortgage, 2.

Of mortgagee's election to declare entire sum due on default in payment of instalment, see Mortgage, 6.

Of hearing on petition for annexation of adjacent territory to school district, see Schools.

Of trial, see Trial, 1.

OBJECTIONS.

Sufficiency of, to present question on appeal, see Appeal and Error, 1a, 2.

OFFICERS.

Jurisdiction of contest of election, see Courts.

Jurisdiction of city council over contest for office of mayor, see Municipal Corporations, 7.

Amending complaint in action to vacate decree quieting title in defendant so as to show latter's fraud as officer of state, see Pleading, 6.

Fraud of attorney acting for county at time of sale by county of land purchased at tax sale, in subsequently purchasing title of original owners, see Stipulations.

OFFICERS—continued.

Estoppel of person acting as state's attorney for county in selling land purchased by county at tax sale to subsequently assert title thereto, see Trusts.

REMOVAL.

1. The proceedings provided for in N. D. Rev. Codes 1905, § 9646, for the removal of public officers by accusation, are neither civil nor criminal, but of a character peculiar to themselves, and the remedy is one in which the legislature has seen fit to provide a special practice which governs in such proceedings only. *State v. Borstad*, 533.
2. It was the intention of the legislature in enacting N. D. Rev. Codes 1905, § 9646, relative to the removal of public officers by accusation, to provide a remedy which would be summary in its nature, and which, by the avoidance of technical delays, might serve to protect the public from the acts of incompetent or dishonest officials. *State v. Borstad*, 533.
3. No demurrer is contemplated or authorized by N. D. Rev. Codes 1905, § 9646, relative to the removal of public officers by accusation, as its interposition would necessitate delay. *State v. Borstad*, 533.
4. Under the proceedings provided for in N. D. Rev. Codes 1905, § 9646, for the removal of public officers by accusation, an examination of the adverse party upon the trial may be had under § 7252, as amended by the Laws of 1907, chap. 4, providing that in such examination the constitutional right of the defendant to refuse to testify as to matters which may tend to render him liable to prosecution in a criminal action is recognized and preserved, but such privilege must be specifically asserted and relied upon by the defendant. *State v. Borstad*, 533.
5. Under N. D. Rev. Codes 1905, § 9646, providing for the removal of public officers by accusation, an objection to the introduction of any evidence under the accusation should be allowed and sustained only where it affects the real merits of the controversy, and the real and fundamental rights of the defendant, and it should not be sustained where the only defects complained of are an improper joinder of parties defendant and of issues involving different parties, and these defects have been cured and eliminated from the proceedings by the granting of a motion for a separate trial. *State v. Borstad*, 533.
6. The members of a board of county commissioners have no right or authority to charge a *per diem* for time spent in going to and from the meetings of the board of commissioners, and the charging of such fees is a ground for a removal from office. *State v. Borstad*, 533.
7. A member of a board of county commissioners who charges illegal fees while in office will not be allowed to say that such fees, although illegal and un-

OFFICERS—continued.

warranted, were for services outside of his office, and that the charging thereof is therefore not a ground for removal under N. D. Rev. Codes 1905, § 9646. *State v. Borstad*, 533.

COMPENSATION.

Illegal charge for, as ground for removal, see ante, 6, 7.

Proof of charges beyond reasonable doubt, see Evidence, 13.

8. A county commissioner has no right under the seed grain law, N. D. Laws 1909, chap. 210, to charge for services rendered in receiving applications for loans of seed grain, or for collecting the sums due to the county therefor, or in protecting the liens of the county, although N. D. Rev. Codes 1905, § 2401, as amended by the Laws of 1911, chap. 118, makes it the duty of such commissioners "to superintend the fiscal affairs of the county." *State v. Borstad*, 533.
9. A visit of a county commissioner to a neighboring county for the purpose of trying to arrange for the care of the poor of his district in such neighboring county is a visit as an overseer of the poor, and not as a county commissioner, and only the *per diem* of \$2 provided for by N. D. Rev. Codes 1905, § 1868, as the *per diem* of an overseer of the poor, can be charged therefor. *State v. Borstad*, 533.

OPENING JUDGMENT. See Judgment, 2-5.

ORDER OF PROOF.

As ground for reversal, see Appeal and Error, 12.

ORDINANCE.

For public improvement, see Public Improvements, 2.

See also Municipal Corporations, 8-10.

ORIGINAL PACKAGE.

What constitutes sale in, see Commerce, 2.

PARLIAMENTARY LAW.

The right to hold the office of mayor must be determined in conformity with the provisions of N. D. Rev. Codes 1905, § 2747, requiring the determination thereof by lot in case of a tie, where the court decides that each party is entitled to an equal number of legal votes. *Nelson v. Gass*, 357.

PAROL EVIDENCE.

As to writing, see Evidence, 5.

PARTIAL INVALIDITY.

Of statutes, see Statutes.

PARTIES.

Abuse of discretion in permitting plaintiff to amend complaint so as to change character of plaintiff from individual to partnership, see Appeal and Error, 6.

Who may maintain action to test validity of proceedings for annexing territory to city, see Municipal Corporations, 3.

Privilege of nonresident parties from service of process, see Process, 2.

To action on warehouseman's bond, see Warehousemen.

PARTNERSHIP.

Abuse of discretion in permitting plaintiff to amend complaint so as to change character of plaintiff from individual to partnership, see Appeal and Error, 6.

Personal judgment against acting members of, see Judgment, 1.

PAYMENT.

Bank's right as to application of deposit, see Banks, 4-7.

Recovery back from agent of advance payments made, see Contracts, 1.

Right to recover back from agent amount stipulated for retention as liquidated damages, see Damages, 2.

Recovery back of taxes paid, see Taxes, 6.

PENALTY.

For liquidated damages, see Damages.

PER DIEM.

Of county commissioner, see Officers, 6, 9.

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PERPETUITIES.

A devise of a remainder estate subject to the payment of certain legacies within a stated time, not being made subject to a condition precedent, does not operate to suspend the power of alienation. Re Gray, 417.

PERSONAL JUDGMENT. See Judgment, 1.

PETITION.

For annexation to school district, see Schools.

PLEA. See Pleading, 3, 4.

PLEADING.

Sufficiency of petition for annexation to school district, see Schools.

COMPLAINT.

1. **A complaint and a summons in an action in the justice court disclose an action in forcible entry and detainer brought under N. D. Rev. Codes 1905, § 8406, subdiv. 2 or 3, giving the court jurisdiction, although no notice to vacate is given before the commencement of the action, where the complaint states in effect that the defendant has no right to the use or occupation of certain premises or any part thereof, but is occupying part thereof as a trespasser wilfully, unlawfully, and forcibly, to the exclusion of the owner thereof, and that the defendant has erected a house extending several feet upon the plaintiff's property, and has refused, upon demand, to remove the same, and is holding possession unlawfully and forcibly, to the exclusion of the owner thereof, the prayer for relief asking for immediate ejectment and for damages for retention, use, and occupancy, and the summons charging that the lot is retained by the defendant unlawfully, forcibly, and to the exclusion of the owner thereof. Savold v. Baldwin, 342.**
2. **A complaint in an action for the foreclosure of a mortgage on land, by an attorney holding a power of attorney authorizing him to foreclose such mortgage, sufficiently complies with N. D. Rev. Codes 1905, § 7455, providing that it shall be unlawful for an attorney of a mortgagee to foreclose a real estate mortgage without a power of attorney authorizing such foreclosure, and making it necessary to allege the possession of such power in the complaint in the foreclosure proceedings, which alleges**

PLEADING—continued.

that, prior to the commencement of the action, the plaintiff executed and delivered to a certain attorney a power of attorney duly authorizing and empowering him to take all proceedings necessary for the foreclosure of the plaintiff's mortgage and the collection of plaintiff's debt, and to commence and maintain the action, although the words "power of attorney" are omitted therefrom, as it contains enough to fully apprise the defendant that the attorney possesses such power of attorney. *Hocksprung v. Young*, 322.

PLEAS OR ANSWER.

3. In an action by an automobile dealer against a distributing company to recover an advance payment made under an agreement between the dealer and the company whereby the dealer is given the exclusive right to sell automobiles in a number of counties upon his order for a number of cars and the making of an advance payment on each car, which advance it is stipulated in the agreement is to be retained by the company as liquidated damages in case of the failure of the dealer to take and pay for the cars ordered, it is not incumbent upon the distributing company to allege an offer to deliver the cars to the dealer under the contract. *Gile v. Interstate Motor Car Co.* 108.
4. In a mechanics' lien foreclosure action a party defendant may, under N. D. Rev. Codes 1905, § 6245, by answer or cross complaint, assert and procure foreclosure of a lien upon the premises involved, independent of any relief sought against the plaintiff, and although such defendant admits the claim of the plaintiff in its entirety, as § 6860, defining the requisites of counterclaims, has no application to causes of action voluntarily joined or consolidated under such mechanics' lien foreclosures. *Dakota Sash & Door Co. v. Brinton*, 39.

REPLY.

5. The fact of a former adjudication of the issues raised by an answer may be proved by the plaintiff, although not pleaded by a reply filed by him, where no request for a reply is made by the defendant, and no reply is required by the court, under N. D. Rev. Codes 1905, § 6863, providing for a reply when the answer contains new matter constituting a counterclaim, and in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter. *Kain v. Gar-naas*, 292.

PLEADING—continued.

AMENDMENTS.

Abuse of discretion in permitting plaintiff to amend complaint so as to change character of plaintiff from individual to partnership, see Appeal and Error, 6.

See also Judgment, 2; Pleading, 6.

6. An amendment to a complaint in equity by the claimants of land purchased by a county under invalid tax sales and sold to grantors of claimants, for the vacation of a decree quieting title in defendant, who had bought up the title of the fee owners, should be allowed so as to set up facts relative to the defendant having acted as state's attorney at the time the land was sold by the county to claimant's grantors, his having acted as attorney for claimants' grantors, and the fact that his deeds were obtained for a nominal consideration and upon alleged misrepresentations, where it was shown by affidavits that the new facts sought to be proven had just been discovered, and no prejudice would have resulted to the defendant, because the trial was still in progress and he had ample time within which to meet the issues. *Patterson Land Co. v. Lynn*, 391.

PLEDGE.

Right of pledgee of note to maintain action thereon, see Bills and Notes, 1-3.

POLICE POWER.

Validity of statute within, see Constitutional Law, 3.

POSTOFFICE.

Service by mail of notice of entry of judgment limiting time to appeal, see Appeal and Error, 3.

POWER OF ATTORNEY.

Attorney's authority under, to foreclose mortgage, see Mortgage, 5; Pleading, 2.

PREJUDICIAL ERROR. See Appeal and Error, 11-16.

PRELIMINARY EXAMINATION. See Criminal Law, 2, 3.

PRESENTMENT.

Necessity of presenting demand note for payment, see Bills and Notes, 4, 5.

PRESUMPTIONS. See Evidence, 2-4.

PRINCIPAL AND AGENT.

Implied agreement by agent to return advance payments, see Contracts, 1.

Right to recover back from agent amount stipulated for retention as liquidated damages, see Damages, 2.

Power of attorney to sell half-breed scrip, see Indians.

When agreement with agent lacks consideration authorizing recovery back of advance payments made, see Money Received.

Attorney's authority under power of attorney to foreclose mortgage, see Mortgage, 5; Pleading, 2.

Sufficiency of answer in action to recover from agent, advance payment which it was agreed agent to keep as liquidated damages, see Pleading, 3.

PRIORITY.

Between assignor and assignee of certificate of sale under power in mortgage on default of interest, see Assignment.

Between mortgagee and assignee of unrecorded executory contract for purchase of land, see Mortgage, 4.

PRIVILEGE.

From service of process, see Process, 2.

PROCESS.

SERVICE BY PUBLICATION.

1. The provisions of N. D. Rev. Codes 1905, § 6840, relating to service by publication, are strictly construed, and must be strictly complied with. *Dallas v. Luster*, 450.

PROCESS—continued.

PRIVILEGE FROM SERVICE.

2. The common-law privilege exempting suitors and witnesses, residents of a foreign state, in civil cases, on their claim of privilege, from service of civil process while in attendance as civil suitors or witnesses in the courts of this state, until after a reasonable opportunity afforded them to return to their abode, does not include nonresident defendants in criminal proceedings, temporarily here to defend in the criminal action against them, when the criminal proceedings are prosecuted in good faith, and not fraudulently instituted merely for the purpose of procuring the presence of the foreign residents, that they might be here served with civil process. and such defendants may therefore while here be served with a summons and complaint and arrested under bail and arrest proceedings, as incident to such civil action, and held to civil bail, without there being afforded them any opportunity to return to their home in the foreign state. *Re Henderson*, 155.

PROMISSORY NOTES. See Bills and Notes.

PROXIMATE CAUSE.

The gross negligence of a notary in taking the acknowledgment of a person with whom he is not acquainted to a deed as grantor, when he was in fact the grantee mentioned in the deed, without asking him his name, is the proximate cause of the injury to a purchaser from the grantee, and not the subsequent deed to the purchaser, where the first deed had originally been prepared in blank by an attorney representing both parties, and the acknowledgment had taken place in a distant city, and the second deed was also prepared by such attorney, and acknowledgment taken before him as a notary. *Peterson v. Mahon*, 92.

PUBLICATION.

Service by, see Process, 1.

Of notice of hearing on petition for annexation of adjacent territory to school district, see Schools.

PUBLIC BUILDINGS. See Counties; Eminent Domain.

PUBLIC IMPROVEMENTS.

CONTRACTS.

1. The provisions of N. D. Rev. Codes 1905, § 2780, as amended by N. D. Laws 1907, chap. 46, to the effect that advertisements for bids for the construction of sewers "shall specify the work to be done, according to the plans and specifications therefor on file in the auditor's office, and shall call for bids therefor upon a basis of cash payment for said work, and state the time within which such bids will be received, and within which such work is to be completed," and that the city council may also require bidders "to state the rate of interest the warrants shall bear (not exceeding 7 per cent per annum), which are to be received and accepted by them at par in payment for such work,"—are mandatory and must be reasonably complied with in so far as the provision in regard to the bids upon a cash basis and the rate of interest which the warrants shall bear are concerned, although a defect in the advertisement in this respect may be cured by the fact that all of the bids are in fact upon a cash basis, and give the rate of interest which the warrants, if any, shall bear. *McKenzie v. Mandan*, 546.

ORDINANCES FOR IMPROVEMENT.

See also post, 10.

Ordinance creating assessment districts, see post, 17, 19.

- 2, 3. An objector will not be heard to complain in an equity proceeding to set aside a special assessment, that the ordinance upon which it was based was placed upon its second reading and final passage by one and the same vote, as such a proceeding is at the most irregular. *Robertson Lumber Co. v. Grand Forks*, 556.

ASSESSMENTS GENERALLY.

4. While, ordinarily, a city council is the sole judge of the necessity of sewers, and of the efficiency, durability, and adaptability of those already in existence, nevertheless its judgment is not conclusive where the existing sewer is in reasonably good repair, and is adequate to carry off the sewage and drainage, both present and prospective, in the district in which it was originally constructed, and the construction of a new sewer is necessary only because of the need of outlying districts. *Robertson Lumber Co. v. Grand Forks*, 556.

PUBLIC IMPROVEMENTS—continued.

5. The fact that property within an assessment district was omitted from the assessment cannot be urged against the validity of the proceedings by one whose assessment is not increased by reason of such omission. *Robertson Lumber Co. v. Grand Forks*, 556.

—PROCEEDINGS FOR ASSESSMENT.

6. The failure of a special assessment commission, in seeking to levy an assessment under N. D. Rev. Codes 1905, § 2801, to inspect the land and to make or cause to be made a complete list of both benefits and the assessments, or the computation of such assessments by a method unwarranted by the statutes, renders such assessment void. *McKenzie v. Mandan*, 546.
7. It is fundamental to the levying of special assessments for improvements by the commissioners, and the confirmation thereof by the city council and the validity of any assessment, that the provisions of N. D. Rev. Codes 1905, § 2801, requiring that the commissioners shall personally inspect the property to be assessed, and shall not only determine the amount which each lot or parcel of land which is sought to be assessed will be especially benefited, but shall make a complete list of such benefits, shall be complied with. *Robertson Lumber Co. v. Grand Forks*, 556.

—WAIVER OF OR ESTOPPEL AS TO OBJECTIONS.

See also post, 15.

8. An objection that a special assessment for improvements levied under N. D. Rev. Codes 1905, § 2801, was made in a manner unwarranted by statute, is not waived by the failure to urge it before the commissioners or the city council, but it may be relied upon and urged in a subsequent suit in equity to restrain the collection of the tax. *Robertson Lumber Co. v. Grand Forks*, 556.
9. Objections to an assessment made under N. D. Rev. Codes 1905, § 2801, which do not involve the legality of the proceedings or the methods pursued, but which seek to correct errors in judgment and mistakes as to the real amount the property is benefited, must be urged before the commissioners and the city council, and if not so urged, cannot afterward be relied upon in a subsequent suit in equity to restrain their collection. *McKenzie v. Mandan*, 546.
10. Where, after the passage of an ordinance authorizing the construction of a sewer, an amendment is introduced reducing the area of the sewer district, but, by accident or mistake, the ordinance as passed increases instead of reduces the area, but plats and maps are filed with the city

PUBLIC IMPROVEMENTS—continued.

auditor properly describing the course of such sewer, and such district, and the contract for the construction of the sewer is let in conformity therewith, and, after its construction, and before the levying of the special assessment to pay therefor, the ordinance is amended so as to conform to the proposed and original amendment, a property owner whose property has at all times been included within the areas covered, and who has made no objection based upon the defect of description, either before the commissioners or the city council, is not entitled to a decree in equity setting aside and declaring invalid such assessment. *Robertson Lumber Co. v. Grand Forks*, 556.

—RULES OF APPORTIONMENT.

11. Special assessments must be made on the basis of benefits, and of benefits alone, under N. D. Rev. Codes of 1905, § 2801. *McKenzie v. Mandan*, 546.
12. The area method should be adopted as a means of arriving at the benefit, but not as the sole criterion thereof, under N. D. Rev. Codes 1905, § 2801, requiring special assessments to be levied in proportion to the benefits conferred. *Robertson Lumber Co. v. Grand Forks*, 556.
13. An assessment according to the area is not necessarily invalid under N. D. Rev. Codes 1905, § 2801, requiring special assessments for improvements to be levied in proportion to the benefits conferred, but containing no provision as to the manner in which the benefits shall be measured or ascertained, provided that, after a proper inspection, it is found that the increased value or benefit is in proportion to that area. *Robertson Lumber Co. v. Grand Forks*, 556.
14. The finding that a certain area will require a certain number of outlets, or can make a certain number of connections with a sewer, is not a finding of the extent to which each lot or area in a given district will be benefited by the improvement, under N. D. Rev. Codes 1905, § 2801, requiring special assessments to be levied in proportion to the benefits conferred. *Robertson Lumber Co. v. Grand Forks*, 556.

—RESTRAINING ENFORCEMENT.

15. Property owners are not precluded from bringing an action in a court of equity to enjoin the collection of a void assessment levied under N. D. Rev. Codes 1905, § 2801, by the mere fact that they did not appear before the board of commissioners or the city council to object to such assessment. *McKenzie v. Mandan*, 546.
16. A complaint in an action in equity to restrain the collection of an assess-

PUBLIC IMPROVEMENTS—continued.

ment levied under N. D. Rev. Codes 1905, § 2801, which alleges "that such special assessment commission, in attempting to determine the actual benefits to accrue to the lots and parcels of land in said pretended assessment district, by the construction of said sewer, acted arbitrarily and unlawfully and by an inflexible rule, and totally failed and neglected to exercise any discretion; that it did not determine said benefits, if any there were, at the time nor in the manner prescribed by law, but, first determining arbitrarily how much the cost of said sewer and of said trunk line should be borne by each of the lots in said district, and having so determined the amount to assess against each lot and parcel of land arbitrarily and illegally as aforesaid, and basing the estimate of benefits upon the cost of the sewer and the proportion thereof assessed to each lot and parcel of land, determined that each lot or parcel of land in said district was benefited 50 per cent more than the proportion of cost so assessed: and this, though many of the lots and parcels of land in said sewer district were not benefited at all by said sewer, and some were benefited more than others, and some were so situated that said sewer could not serve them,"—sufficiently alleges an illegal method of procedure on the part of commissioners, which is not warranted by N. D. Rev. Codes 1905, § 2801. *McKenzie v. Mandan*, 546.

ASSESSMENT DISTRICTS.

17. A description in an ordinance creating a sewer district, which reads: "All lots and parts of lots and all parcels of land within the city of Mandan, Morton county, North Dakota, as the same is now planted and recorded in the office of the register of deeds in the aforesaid Morton county, which lies north of the right of way of the Northern Pacific Railway Company including Mandan proper, First Northern Pacific Addition to Mandan, Heart View Addition to Mandan, that portion of Mead's Addition to Mandan lying north of said right of way, and all Helmsworth & McLean's Addition to Mandan, all of said right of way belonging to the said Northern Pacific Railway Company," includes that portion of Helmsworth & McLean's Addition which lies south of the railway track, as well as that portion which lies north thereof. *McKenzie v. Mandan*, 546.
18. An ordinance which creates a sewer district is not invalid because it contains a clause to the effect that said district is created for all purposes of local improvement within the boundaries thereof contemplated by the provisions of the laws of North Dakota as laid down in art. 18, chap. 30, of the Political Code of 1905, relating to sidewalks, paving, and water mains, as well as to sewers, as, even if such clause is not con-

PUBLIC IMPROVEMENTS—continued.

strued as relating to sewer purposes merely, it might be stricken from the ordinance as surplusage, and if the ordinance is otherwise complete and connected in subject-matter, it might stand and be enforceable after such exclusion. *McKenzie v. Mandan*, 546.

19. Where an ordinance creating a sewer district contains a provision that the district so established "is so created for all purposes of local improvements within the boundaries thereof contemplated by the provisions of the laws of North Dakota as laid down by article 18, chap. 30, of the Political Code of 1905," and the title of the ordinance is "An Ordinance Creating and Establishing Sewer Improvement District No. 1 in the City of Mandan, North Dakota, and Defining the Boundaries of the Same," and no other improvement is spoken of in the ordinance but that of a sewer,—the title may be used for the purpose of arriving at the intention of the council, and such clause may be construed as relating merely to sewer purposes. *McKenzie v. Mandan*, 546.

PUBLIC LANDS.

Land of Indians, see Indians.

PUBLIC OFFICERS. See officers.**PUBLIC SERVICE CORPORATION.**

Injunction against breach of contract by, see Injunction, 1-6.

QUESTION FOR JURY. See Trial, 2, 4.**QUESTION OF FACT.**

On appeal, see Appeal and Error, 10.

QUIETING TITLE.

Who may maintain action to vacate decree quieting title, see Judgment, 3.

Amendment of complaint in proceeding for vacating decree quieting title, see Pleading, 6.

Setting aside for fraud stipulation in action to quiet title, see Stipulations.

QUO WARRANTO.

As proper remedy to prevent city officers from illegally annexing adjacent territory, see Injunction, 7.

RAILROADS.**ACCIDENTS AT CROSSINGS.**

A driver of a team who approaches a railway side track crossing from the north at the rate of 3 or 4 miles per hour, the distance between the middle of which and the middle of the main track is 65 feet, his view of an oncoming freight train on the main track being obscured by a string of freight cars, and neglects to look for the train which is coming in a northwesterly direction at the rate of 12 miles per hour, until his horses are nearly, if not quite, in front of the approaching train, and the engine is within 2 rods of him, is guilty of contributory negligence as a matter of law. *Haugo v. Great Northern R. Co.* 268.

RATIFICATION.

By landlord of tenant's unauthorized contract for drilling of well, see Mechanic's Liens.

REAL PROPERTY.

Land of Indians, see Indians.

Mortgage of, see Mortgage.

REASONABLE DOUBT.

Proof of charges against officer beyond, in action for removal, see Evidence, 13.

RECORD.

On appeal, see Appeal and Error, 4, 7.

Recording of mortgage, see Mortgage, 2, 3.

RECOVERY BACK.

Of taxes paid, see Taxes, 6.

REMOVAL.

Of officer, see Officers, 1-7.

RENT.

Right of purchaser of mortgaged premises at execution sale to rent, as against purchaser on subsequent foreclosure, see Mortgage, 8, 9.

REPLEVIN.

Right of chattel mortgagor to maintain action of conversion against person repleving mortgaged chattels, see Trover, 2.

REPLY. See Pleading, 5.

RESIDENCE.

Of voters, see Elections.

RES JUDICATA. See Judgment, 6, 7.

REVERSIBLE ERROR. See Appeal and Error, 11-16.

RUNNING AT LARGE. See Animals.

SCHOOL DISTRICTS. See Schools.

SCHOOLS.

Annexation to municipal corporations, see Injunction, 7; Municipal Corporations, 1-6.

ALTERATION OF DISTRICTS.

Grounds for enjoining annexation of territory to district, see Injunction, 8.

See also Municipal Corporations, 3.

1. The petition for the annexation of adjacent territory to a special district for school purposes need not set forth all the facts, the existence of which is required by statute to authorize the board to act, as it is for the board of the special district to determine, before allowing such petition, whether the jurisdictional prerequisites in fact exist authorizing the granting of the prayer of the petitioners. School Dist. v. Thompson, 459.

SCHOOLS—continued.

2. That fact that the signers of a petition for the annexation of adjacent territory to a special district for school purposes are not the owners of the real property sought to be annexed, or that they contemplate a removal from such land at a future time, does not disqualify them from acting while they remain as voters in such adjacent territory. *School Dist. v. Thompson*, 459.
3. There is sufficient notice of a hearing on a petition for the annexation of adjacent territory to a special school district before the board of such district, under N. D. Laws of 1911, chap. 266, § 133, requiring fourteen days' notice of the hearing to be given by publication in the nearest newspaper and posting of notices in three conspicuous places, in the special district, three in the territory sought to be annexed, and three in the district remaining from which the territory shall be taken, where the notice is published once only in the nearest newspaper fourteen days prior to the hearing, and the notice is posted as prescribed by such section. *School Dist. v. Thompson*, 459.

SCRIP.

Half-breed scrip, see *Indians*.

SEED GRAIN.

Lien for services in receiving applications for loan of, see *Officers*, 8.

SELF-CRIMINATION.

Privilege against, in proceedings for removal of officer by accusation, see *Officers*, 3.

SERVICE.

Of notice of entry of judgment limiting time to appeal, see *Appeal and Error*, 3.

Of notice of trial after change of venue, see *Trial*, 1.

By publication, see *Process*, 1.

SET-OFF AND COUNTERCLAIM.

Bank's right to set off debt against deposit, see *Banks*, 4.

SUBJECT MATTER.

1. One sued for wrongful seizure of personal property cannot counterclaim in

SET-OFF AND COUNTERCLAIM—continued.

such action a right of possession of such property, which has been acquired subsequent to the original wrongful seizure. *Kain v. Garnaas*, 292.

2. The acceptance of a deed, as permitted by a decree of specific performance, if a lease to other land could not be assigned, and the giving of a purchase-price real estate mortgage by the mortgagor as a part performance of a decree of specific performance of a contract for sale of land by the mortgagee, including buildings, fencing, and an assignment of a lease, does not preclude the mortgagor from recouping, in an action to foreclose the mortgage, actual damages sustained because of removal of buildings on the premises after execution of the contract of sale, and prior to the acceptance of the deed, although the mortgagee claimed that he never owned them, and that they were removed by the tenant, as the contract is still executory, notwithstanding its partial performance by delivery of the deed, and the damages are for matters collateral to the title transferred by deed. *Smith v. Bradley*, 613.
3. A mortgagor is not entitled to recover for the nonassignment of school leases in an action for the foreclosure of a purchase-price real estate mortgage given by the mortgagor as part performance of the decree of specific performance of a contract of sale of land, including school leases, rendered in favor of the mortgagor, where the mortgagor knew that the school land was not leased to anyone, or could have ascertained the fact upon inquiry, and could have received a lease from the state for the same term as the mortgagee claimed to have a lease for. *Smith v. Bradley*, 613.

SEWERS.

Contracts for construction of, see *Public Improvements*.

SITE.

For county buildings, acquisition of, see *Counties*; *Eminent Domain*.

SPECIAL ASSESSMENTS.

For public improvements, see *Public Improvements*, 4-18.

SPECIFIC PERFORMANCE.

Of contract lacking mutuality, see *Contracts*, 2, 3, 5.

By injunction against breach of contract, see *Injunction*, 1-4.

STATE BONDING DEPARTMENT.

Unlawful delegation of power to, see *Constitutional Law*, 1, 2.

Invalidity of statute as to, as violation of due process of law, see *Constitutional Law*, 7.

STATEMENT OF THE CASE.

On appeal, see *Appeal and Error*, 4, 7.

STATUTES.

Construing statute limiting size of individual loan by bank, see *Banks*, 2.

Strict construction of statute providing annexation of adjacent territory to city, see *Municipal Corporations*, 1.

Strict construction of statute relating to service by publication, see *Process*, 1.

EFFECT OF PARTIAL INVALIDITY.

1. Where a part of a statute is unconstitutional, that fact does not require the courts to declare the remainder void also, unless all the provisions are connected in subject-matter depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. *Malin v. Lamoure County*, 140.
2. Chap. 119 of the Laws of 1909, providing for an initial fee of \$5 upon estates administered in the county court, and a further fee, upon the determination of the value of the estate, of \$5 for every \$1,000 or fraction thereof in excess of the first thousand, which was enacted under a title, viz., "An Act to Amend § . . . of the Revised Codes, . . . Relating to the Fees of County Court," is, in so far as the excess over and above the initial fee is concerned, in violation of a constitutional provision that no bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed. *Malin v. Lamoure County*, 140.

STIPULATION.

Stipulations between parties in an action to quiet title, to the effect that the plaintiff was the owner of the land unless he had been divested of his

STIPULATION—continued.

title by proceedings by the county to sell the land for taxes under the Wood law (N. D. Laws 1897, chap. 67), should be set aside as a fraud upon the court, where the plaintiff was acting as attorney for the county at the time of the sale of the land by the county to the persons from whom the defendant purchased the land, and such persons did not know of the facts relative to his acquisition of the land after the expiration of his term of office, especially when a decree quieting the title to such land in favor of the purchaser had been entered, which was binding upon all parties to the second suit. *Patterson Land Co. v. Lynn*, 391.

STOCK.

Live stock, see *Animals*.

SUMMARY PROCEEDINGS.

For removal of officer by accusation, see *Officers*, 2.

SURPLUSAGE.

In ordinance creating sewer district, see *Public Improvements*, 18.

SUSPENSION OF POWER OF ALIENATION. See *Perpetuity*.

TAKING CASE FROM JURY. See *Trial*, 2-8.

TAXATION.

Right of purchaser at tax sale to maintain action to vacate decree quieting title in purchaser from original owners, see *Judgment*, 3.

Amendment of complaint in proceeding by purchaser at tax sale, to vacate decree quieting title in purchaser from original owners, see *Pleading*, 6.

Partial invalidity of statute providing for tax, see *Statutes*, 2.

CONSTITUTIONAL REQUIREMENTS GENERALLY.

1. A statute providing for an initial fee of \$5 upon estates administered in the county court in addition to expenditures for publishing and sending out notices, which is uniform in its operation, is not unconstitutional as being a denial or sale of justice. *Malin v. Lamoure County*, 140.

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TAXATION—continued.

2. Chap. 119 Laws of 1909, relating to estates administered upon in county courts, providing for an initial fee of \$5 and a further fee, upon the determination of the value of the estate, of \$5 for every \$1,000 or fraction thereof in excess of the first thousand, is, in so far as the additional charge or fee above the initial fee is concerned, a violation of a constitutional provision that all courts shall be open, and every man, for any injury done to him in his land, goods, person, or reputation, shall have remedy by due process of law, and right and justice administered without sale, denial, or delay. *Malin v. Lamoure County*, 140.
3. Chap. 119 of the Laws of 1909, providing for an initial fee of \$5 upon estates administered in county courts, and a further fee, upon the determination of the value of the estate, of \$5 for every \$1,000 or fraction thereof in excess of the first thousand, which was enacted under the title, *viz.*, "An Act to Amend § . . . of the Revised Codes, . . . Relating to the Fees of County Courts," is, in so far as the additional fee over and above the initial fee is concerned, a violation of a constitutional provision that no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied. *Malin v. Lamoure County*, 140.

UNIFORMITY.

4. Chap. 119 of the Laws of 1909, relating to estates administered upon in county courts, providing for an initial fee of \$5 and a further fee, upon the determination of the value of the estate, of \$5 for every \$1,000 or fraction thereof in excess of the first thousand, is, in so far as the additional charge or fee above the initial fee is concerned, in violation of the constitutional provision that all laws of a general nature shall have a uniform operation. *Malin v. Lamoure County*, 140.
5. Chap. 119, Laws of 1909, relating to estates administered upon in county courts, providing for an initial fee of \$5 and a further fee, upon the determination of the value of the estate, of \$5 for every \$1,000 or fraction thereof in excess of the first thousand, is, in so far as the additional charge or fee above the initial fee is concerned, a violation of a constitutional provision that laws shall be passed taxing by uniform rule all property according to its true value in money. *Malin v. Lamoure County*, 140.

RECOVERY BACK OF TAXES PAID.

6. Charges for the administration of an estate which are demanded of the administrator by an officer acting under an unconstitutional law, and

TAXATION—continued.

which are paid by the administrator under written protest, and under circumstances where injury to the estate and the third parties would have resulted from a refusal to pay and a resort to legal remedies to compel the performance of the official duty, are paid under compulsion and duress, and can be recovered from the county upon a proper showing being made. *Malin v. Lamoure County*, 140.

TELEGRAPH.

Mutuality of contract to furnish telegraph service, see *Contracts*, 3, 5.

As to telephones, see *Telephones*.

TELEPHONES.

Mutuality of contract to furnish telephone service, see *Contracts*, 3, 5.

DUTY TO FURNISH SERVICE.

1. A duty rests upon a telephone company to furnish its services to a railroad company as a member of the general public, and it cannot arbitrarily refuse to install a telephone in the railroad company's place of business, so long as no conditions different from those generally given are required, and so long as such services are paid for. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.

CONTRACTS FOR SERVICE.

Injunction against breach of contract to furnish service, see *Injunction*, 3-6.

2. Where a contract entered into by a telephone company with a railroad company, whereby the telephone company agrees to furnish service without cost for a definite period, and not to remove the telephone from the railroad premises as long as it maintains an exchange in the town, is inequitable and unenforceable, the railroad company is liable under such contract for telephone service chargeable from the date of notice of cancellation of such contract to the date of the judgment entered in the case on the order in an equitable action denying the railroad company the right to enjoin the telephone company from removing its telephone. *Great Northern R. Co. v. Sheyenne Teleph. Co.* 256.

TIE VOTE.

Mode of determining title to office of mayor in case of, see Parliamentary Law.

TIME.

For taking appeal, see Appeal and Error, 3.

TITLE.

Of ordinance creating assessment district, see Municipal Corporations, 19.

Of statute, see Statutes, 2.

TOWNS.

Right to maintain action to test validity of proceedings for annexation of part of its territory to city, see Municipal Corporations, 3.

TRIAL.

Reversible error in order of proof, see Appeal and Error, 12.

Right to jury trial in action to foreclose chattel mortgage, see Chattel Mortgage, 2.

By jury, see Jury.

New trial, see New Trial.

NOTICE OF TRIAL.

1. Where a change of venue is taken from one justice to another upon affidavit of prejudice, the notice of the time and place of trial given by the second justice may be served upon either the parties or their attorneys. *DeMars v. Gardner*, 60.

TAKING CASE OR QUESTION FROM JURY.

2. It has always been the province of the courts of equity to determine issues of fact as well as of law, and while the court may submit questions of fact to a jury, this is purely a matter of discretion, and the verdict in such cases is purely advisory. *Gresens v. Martin*, 231.
3. It is a question of fact for the jury whether the leaving of the door of a stove in a warehouse open in order to check the draft and to prevent

TRIAL—continued.

- the fire from burning out constitutes lack of ordinary care where goods are placed in a depot in a room in proximity to which the stove is located, and where inflammable matter is placed within 3 feet of the sides and back of, and within 6 feet of the front of, such stove. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
4. It is a question of fact for the jury whether the leaving of the door of a stove in an adjoining room open, in proximity to inflammable matter, was the cause of the fire which destroyed the goods, where the stove could be regulated only by opening the door, and the door was opened in order to shut the draft and to prevent the fire from burning out, and no other probable cause is disclosed by the evidence. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
 5. A defendant is not entitled to a nonsuit, but the question of negligence should be left to the jury, if, upon a fair construction that a reasonable man might put upon the evidence or any inference that might reasonably be drawn therefrom, the conclusion of negligence can be arrived at or justified. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
 6. A nonsuit should not be granted where the evidence as to the cause of an accident, although circumstantial, is such that it would appear possible that the injury resulted from any one of several causes, and yet it points to the greater probability that it resulted from the specific cause charged by the plaintiff. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
 7. The question of a loss or injury cannot properly be withdrawn from the jury where any facts are shown bearing upon the question, and they afford room for fair-minded men to conclude therefrom that one theory of the case is better supported than the other. *Farmers' Mercantile Co. v. Northern P. R. Co.* 302.
 8. Where, in an action by a purchaser of land against a notary and his bondsmen for damages, sustained as a result of the notary taking an acknowledgment of a forged deed from supposedly third person to his grantor, with whom he was not acquainted and whose name he did not ask, there was no dispute as to the facts and, at the close of the testimony, both parties made motions for an instructed verdict, and made no request to have any issue submitted to the jury, the trial court is justified in taking the case from the jury and deciding the questions of negligence and contributory negligence as questions of law. *Peterson v. Mahon*, 92.

INSTRUCTIONS.

9. A jury should be instructed in relation to the provisions of a criminal statute, when they are in any way pertinent to the issues involved, as the

TRIAL—continued.

- jurors cannot be presumed to be acquainted with such provisions. *State v. Lesh*, 165.
10. It is not error for a court to fail to instruct the jury that an accused's neglect to go upon the witness stand does not create or raise any presumption of guilt against him, where such an instruction is not requested by the accused. *State v. Lesh*, 165.
 11. Upon the question whether a tenant is holding over under an old written lease reserving the title in the landlord to all crops until a division thereof, or is holding under a new verbal lease without such reservation, there is nothing inconsistent with the claim that the tenant is holding over under the old lease, in the reply of the landlord to one who says he has taken a mortgage upon the tenant's half of the crops on the latter's statement that there is a verbal lease under which he is to receive one half of the crops, that there will be nothing charged against the tenant's interest, and that the mortgage will be a first lien on the tenant's half of the crops, so that where the reply of the landlord is the only evidence against his positive testimony that the tenant is holding over under the old lease, the court should instruct that the tenant is so holding over. *Herrmann v. Minnekota Elevator Co.* 235.

TROVER AND CONVERSION.

Right of set-off in action for, see *Set-Off and Counterclaim*, 1.

WHO MAY MAINTAIN ACTION.

1. A chattel mortgagor may maintain an action for conversion against a third person who commenced an action to obtain possession of the property for the purpose of foreclosure, where in such proceedings a judgment was rendered dismissing the action on the ground that the ownership of the note and mortgage was not in such person, although no tender was made to either the mortgagee or to such third person, the mortgagee not having instituted any suit, and not being a party to the records, and, subsequently to the prior action and unlawful seizure, such third person obtained possession and title to such note. *Kain v. Garnaas*, 292.
2. A chattel mortgagor may maintain an action of conversion against a third person for the unlawful seizure of mortgaged property, where such person, not having any right or title to the note which the mortgage secures, or in and to the mortgage, wrongfully replevies and obtains possession of such property for the purposes of foreclosure, and is not barred therefrom by the mere fact that in the original replevin proceedings he merely prayed for a dismissal of the action with costs, and did not ask for a return of the property or for the value thereof. *Kain v. Garnaas*, 292.

TRUSTS.

Creation of, by will, see Wills, 2.

A state's attorney who acts for the county in the sale of several tracts of land which had been bought by the county at tax sales which were defective because of improper notice to fee owners, and who after he leaves office buys antagonistic titles from the fee owners, obtaining title by quitclaim deed or by purchase and foreclosure of mortgages, is an involuntary trustee for the county or a subsequent grantee, and is estopped, although he acted in good faith, from asserting ownership thereto in an action by a subpurchaser from the county against him to quiet title and obtain other equitable relief, especially where he acted for the purchaser from the county in examining the records, although he was not paid a bill which he presented therefor, the information obtained being useful to him in subsequently purchasing the land from the fee owners, and on making such purchase he represented that he simply wanted to clear up the title, concealing his real intention to obtain what he considered to be a perfect title, subject only to lien. *Patterson Land Co. v. Lynn*, 391.

UNDUE INFLUENCE.

Sufficiency of evidence of, see Evidence, 12.

UNIFORMITY.

In taxation, see Taxes, 4, 5.

VACATION.

Of judgment, see Judgment, 2-5.

VALIDITY OF CONTRACT. See Contracts, 6-8.**VENDOR AND PURCHASER.**

Sufficiency of evidence of purchaser's freedom from contributory negligence in taking deed from one having no title, see Evidence, 11.

Sufficiency of evidence of fraud in obtaining signature to deed, see Evidence, 12.

Fraud in sale of land by county for less amount than it paid at tax sale, see Fraud.

VENDOR AND PURCHASER—continued.

Equitable interest of purchaser under unrecorded executory contract as subject of mortgage, see **Mortgage**, 1.

Purchaser on mortgage foreclosure, see **Mortgage**, 8, 9.

Gross negligence of notary in taking acknowledgment as proximate cause of injury to purchaser from grantee, see **Proximate Cause**.

Direction of verdict in action by purchaser against notary for negligence in taking acknowledgment of forged deed to his grantor, see **Trial**, 8.

VENUE.

Notice of trial after change of, see **Trial**, 1.

VESTED REMAINDER. See **Wills**.**VOTERS.** See **Elections**.**WAIVER.**

Appearance as waiver of lack of service in action for divorce, see **Appearance**.

Of appeal from order granting new trial, see **Appeal and Error**, 2.

Of deficiency in size of printed abstract and brief, see **Costs**, 5.

Of objections to assessments for public improvements, see **Public Improvements**, 8–10.

Of default in paying instalment on mortgage by acceptance of draft for interest, see **Mortgage**, 7.

WAREHOUSEMEN.

Carrier's liability as, see **Carriers**, 2.

Question for jury as to negligence in leaving door of stove in warehouse open, see **Trial**, 3, 4.

The action upon a warehouseman's bond should be brought for the benefit of all persons injured, in order to conserve the resources of the bond and prevent multiplicity of suits. *Ertelt v. Lillethun*, 226; *Gruman v. Littlethun*, 227; *Kunze v. Lillethun*, 229.

WEIGHT.

Of evidence, see Evidence, 6-13.

WEIGHTS AND MEASURES.

1. A statute requiring lard, unless sold in bulk, to be put up in pails or other containers holding 1, 3, or 5 pounds net weight, or some whole multiple of these numbers, and not any fraction thereof, is violated by the sale of a pail containing $2\frac{1}{2}$ pounds net weight, although the net weight is stated on the pail. *State v. Armour & Co.* 177.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

See also Constitutional Law, 3-6.

2. A statute requiring lard, unless sold in bulk, to be put up in containers holding a certain number of pounds net weight, cannot be declared unreasonable on the theory that the consumers are not prejudiced by a sale in containers at a gross weight. *State v. Armour & Co.* 177.
3. A custom of packers to use gross weight pails in the sale of lard, although it may have been followed for a number of years, does not render a statute requiring lard to be sold in pails of a certain number of pounds net weight unreasonable. *State v. Armour & Co.* 177.
4. A statute requiring lard, unless sold in bulk, to be sold in containers holding a certain number of pounds net weight, cannot be declared unreasonable on the theory that it imposes an additional expense upon the packers in that they must furnish a different sized pail for the state enacting the statute than is supplied to the rest of the states, especially where it is in evidence that the packer raising the question supplied net weight pails to a private consumer in another state. *State v. Armour & Co.* 177.
5. A statute requiring lard, unless sold in bulk, to be put in containers containing a certain number of pounds net weight, cannot be declared unreasonable on the theory that other traders have been using gross weight measures as well as the traders in lard. *State v. Armour & Co.* 177.
6. A statute requiring lard, unless sold in bulk, to be put up in containers containing a certain number of pounds net weight, cannot be declared unreasonable on the theory that enforcement of the law will drive the packers to use bulk lard only, and that this is unsanitary, especially where the packers supply less than half the trade of the state. *State v. Armour & Co.* 177.

WELL.

Right to mechanics' lien for drilling of, under contract with tenant, see Evidence, 8, 9; Mechanics' Liens.

WILLS.

Action to vacate divorce decree after husband's death to enable widow to contest will, see Divorce.

Suspension of power of alienation by provision of, see Perpetuity.

VESTED REMAINDERS.

1. The fact that a testator who, after devising a life estate in his real property, devised the remainder subject to the payment of certain legacies within a stated time, made no provision for occupancy and control of the real estate during this stated time, nor for the vesting of the title elsewhere in the event the conditions were not complied with by the remainderman, indicates an intention that the remainder estate should vest absolutely in the remainderman, subject merely to a charge thereon in favor of the legates. Re Gray, 417.
2. A will conveying a life estate to the wife of the testator, and subject to the payment of certain legacies within two years after the death of the life tenant, the remainder to a son of the testator, is not a devise to the son upon any condition either precedent or subsequent, but vests in him an unconditional estate subject to the life estate, and impressed with a charge or trust in favor of the legatees named for the payment of such legacies. Re Gray, 417.

WITNESSES.**COMPETENCY.**

In an action for criminal conversation, the marriage between the plaintiff and his wife may be proved by the testimony of the contracting parties. *Vollmer v. Stregge*, 579.

WORK AND LABOR.

Presumption of agreement to pay for, see Evidence, 3.

WRIT. See Process.

Appearance as waiver of lack of service in action for divorce, see Appearance.

Action to vacate divorce decree for lack of service after husband's death, see Divorce.



